No. 2826

United States

Circuit Court of Appeals

For the Ninth Circuit.

NEVADA NORTHERN RAILWAY COMPANY,
a Corporation,

Plaintiff in Error,

vs.

CLYDE W. HOUSTON,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Nevada.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

In the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

CLYDE W. HOUSTON,

Plaintiff,

vs.

NEVADA NORTHERN RAILWAY COMPANY, a Corporation,

Defendant.

Complaint.

The plaintiff, by Messrs. Dixon & Miller, his attorneys, complaining of the defendant, alleges as follows:

I.

That at all the times herein mentioned the defendant was and now is a corporation organized and existing under the laws of the State of Maine, and during all of such time has owned and operated a railroad running from Copper Flat to McGill, both in White Pine County, State of Nevada, and running to Cobre in the County of Elko, State of Nevada.

II.

That prior to the 19th day of March, 1914, the plaintiff was engaged and employed by the defendant as brakeman, at a wage or compensation of $145 per month, and on said 19th day of March, 1914, in the course of his employment was actually engaged as a brakeman on a train numbered 93, consisting of an engine and cars carrying ore from Copper Flat to McGill, in White Pine County, State of Nevada; that at such time when the said ore train numbered 93 was proceeding at a rapid rate from said Copper

Flat to said McGill, by and through the negligence and gross carelessness of the defendant, its officer, agents and other employees, a head-on collision occurred between said ore train and light engine 6 running on the main line of said railroad in the opposite direction from said ore train; [1*] that in order to save his life the plaintiff and each of the other train hands of and in charge of said ore train jumped therefrom immediately before the occurring of said collision; that by reason thereof the plaintiff then and there sustained and suffered divers serious injuries in his back and spinal cord, his neck and his right leg, and was cut, scratched, bruised and injured in divers other parts of his body; that by reason of said injuries, the plaintiff has been unable to work at his regular business as brakeman for the period of 200 days, and has been permanently injured and disabled, so that the plaintiff believes, and therefore avers, that he will be unable to engage in his said occupation as railway brakeman during the remainder of his life, and that he has been so injured and permanently disabled that during the remainder of his life he will be unable to do or perform any manual or other work sufficient to earn his living; that said plaintiff has not sufficient education to engage in any occupation except manual labor. That in consequence of said injuries the plaintiff suffered excruciating pain and agony of body and mind, and his nerves were greatly injured and his nervous system wholly disordered; that the defendant has been obliged to expend large sums of money and to incur

*Page-number appearing at foot of page of original certified Record.

large liabilities in endeavors to have himself cured of said injuries and maladies and the effects thereof.

III.

That the plaintiff is not a resident or a citizen of the State of Nevada, but is a citizen and resident of another State.

IV.

That the defendant, by notice in writing, filed with the Nevada Industrial Commission and posted in conspicuous places where its business was and is carried on, rejected the provisions of "An Act relation to the compensation of injured workmen in the industries of this state and the compensation to their dependents where such injuries resulted in death, creating an Industrial Insurance Commission providing for the creation and disbursement of funds for the compensation and care of workmen injured in the course [2] of employment, and defining and regulating the liability of employers to their employees; and repealing all acts and parts of acts in conflict with this Act," approved March 15, 1913, and being numbered Chapter III of the statutes of the State of Nevada, passed at the 26th Session of the Legislature in the year 1913.

V.

That by reason of said injuries the plaintiff has sustained loss and damage in the sum of Fifty Thousand ($50,000) Dollars.

WHEREFORE, the plaintiff demands judgment against the defendant for said sum of $50,000, to-

gether with his costs of suit.

DIXON & MILLER,
Attorneys for Plaintiff.

State of Utah,
County of Weber,—ss.

Clyde W. Houston, being first duly sworn, deposes and says: That he is the above-named plaintiff; that he has read the foregoing complaint and knows the contents thereof; and that same is true of his own knowledge, except as to matters stated on his information and belief, and as to those matters he believes it to be true.

CYLDE W. HOUSTON.

Subscribed and sworn to before me this 5th day of October, A. D. 1914.

[Seal] OLIN A. KENNEDY,
Notary Public in and for the State of Utah.
My Commission expires July 18, 1917.

[Endorsed]: Hon. Thomas F. Moran. No. 10,586. In the Second Judicial District Court of the State of Nevada in and for the County of Washoe. Clyde W. Houston, Plaintiff, vs. Nevada Northern Railway Company, a Corporation, Defendant. Complaint. Filed Oct. 7, 1914. W. A. Fogg, Clerk. By E. H. Beemer, Deputy Clerk. Dixon & Miller, Rooms 2, 3 and 4, Journal Block, Reno, Nevada, Attorneys for Plaintiff.

No. 1874. U. S. Dist. Court, Dist. Nevada. Filed December 15th, 1914. T. J. Edwards, Clerk. [3]

In the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

CLYDE W. HOUSTON,

Plaintiff,

vs.

NEVADA NORTHERN RAILWAY COMPANY, a Corporation,

Defendant.

Summons.

The State of Nevada Sends Greeting to said Defendant:

You are hereby summoned to appear within ten days after the service upon you of this Summons if served in said county, or within twenty days if served out of said county but within said judicial district, and in all other cases within forty days (exclusive of the day of service), and defend the above-entitled action. This action is brought to recover a judgment against you for the sum of $50,000 and costs of suit by reason of injuries sustained by the plaintiff as the result of a head-on collision between ore train number 93 and light engine number 6, on or about the 19th day of March, 1914, as more fully described in complaint.

Dated this 7th day of October, A. D. 1914.

[Seal] W. A. FOGG,

Clerk of the Second Judicial District Court of the State of Nevada, in and for Washoe County.

By E. H. Beemer,

Deputy.

DIXON & MILLER,

Attorneys for Plaintiff. [4]

SHERIFF'S RETURN.

Sheriff's Office,
County of White Pine,
State of Nevada.

I hereby certify and return that I received the within Summons on the ninth day of October, A. D. 1914, and that I personally served the same upon the within named defendants, The Nevada Northern Railway Company, through their attorneys, Chandler & Quayle, of Ely, White Pine County, Nevada, by showing the original Summons to them and delivering to them a copy of the same, in Ely, White Pine County, State of Nevada, on the ninth day of October, A. D. 1914, and I further return that I delivered to the said Nevada Northern Railway Company, through their attorneys, Chandler & Quayle, of Ely, White Pine County, State of Nevada, a certified copy of the complaint in said within entitled action, with a copy of the Summons attached, at the same time and place.

Dated this 15 day of October, A. D. 1914.

C. S. CRAIN,
Sheriff of White Pine Co.
By Geo. W. Jackson,
Deputy Sheriff.

Service of the within summons, and copy of complaint on this 9th day of October, 1914, is hereby acknowledged; said service having been made at Ely, White Pine County, Nevada.

NEVADA NORTHERN RAILWAY COMPANY,
By CHANDLER & QUAYLE,
Its Attorneys.

[Endorsed]: Judge Moran. No. 10,586. In the Second Judicial District Court of the State of Nevada, in and for the County of Washoe. Clyde W. Houston, Plaintiff, vs. Nevada Northern Railway Company, a Corporation, Defendant. Summons. Returned and filed October 20, A. D. 1914. W. A. Fogg, Clerk. By F. K. Unsworth, Deputy Clerk. Dixon & Miller, Attorneys for Plaintiff.

No. 1874. U. S. Dist. Court, Dist. Nevada. Filed December 15th, 1914. T. J. Edwards, Clerk. [5]

In the United States District Court for the Ninth Circuit, District of Nevada.

CLYDE W. HOUSTON,

Plaintiff,

vs.

NEVADA NORTHERN RAILWAY COMPANY, (a Corporation),

Defendant.

Answer.

Now comes the above-named defendant and answers plaintiff's complaint on file herein as follows:

Answering paragraph II of said complaint, defendant avers that as to the following portions of said complaint, appearing on page 2 thereof and in paragraph II, to wit: "That by reason of said injuries, the plaintiff has been unable to work at his regular business as brakeman for the period of two hundred days and has been permanently injured and disabled," and "that said plaintiff has not sufficient education to engage in any occupation except manual labor," and "that the defendant (plaintiff?) has

been obliged to expend large sums of money and to incur large liabilities in endeavors to have himself cured of said injuries and maladies and the effects thereof''—defendant has no information or belief upon the subjects sufficient to enable it to answer the same, and placing its denial on that ground denies the same and each portion thereof. Defendant further denies all other matters and things in said paragraph II contained, except those contained in the first seven lines of said paragraph, and except, further, that defendant admits that at the time and place mentioned in said paragraph a head-on collision did occur between the ore train and the engine mentioned therein, as a result of which collision plaintiff suffered slight bruises and scratches, from which he speedily recovered and which did not [6] incapacitate plaintiff from performing his usual and ordinary work for a period of more than thirty days.

Further answering, defendant denies all matters contained in paragraph III of said complaint.

Answering paragraph V, defendant denies that by reason of the pretended injuries by plaintiff, complained of plaintiff has sustained loss or damage in the sum of Fifty Thousand Dollars or in any other sum.

WHEREFORE, defendant prays that plaintiff recover nothing in this action and that defendant have judgment for its costs.

CHANDLER & QUAYLE,
Attorneys for Defendant.

CURTIS H. LINDLEY,
Of Counsel.

State of Nevada,
County of White Pine,—ss.

T. J. Duddleson, being first duly sworn, deposes and says: That he is an officer, to wit, the superintendent of said corporation named in the foregoing answer, and as such officer makes this verification in behalf of said corporation; that he has read the foregoing answer and knows the contents thereof and the same is true of his own knowledge except as to matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

T. J. DUDDLESON.

Subscribed and sworn to before me this 10th day of March, 1915.

[Seal] J. W. BIGGANS,
Notary Public in and for said County and State.

[Endorsed]: No. 1874. In the United States District Court for the Ninth Circuit, District of Nevada. Clyde W. Houston, Plaintiff, vs. Nevada Northern Railway Company (a Corporation), Defendant. Answer. Filed March 15, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Chandler & Quayle, Attorneys for Defendant. Ely, Nevada. [7]

In the District Court of the United States, for the District of Nevada.

No. 1874.

CLYDE W. HOUSTON,

vs.

NEVADA NORTHERN RAILWAY CO., a Corporation.

Verdict.

We, the jury in the above-entitled case, find for the plaintiff, and assess the damages in the sum of $12,500.00.

Dated, December 11, 1915.

E. E. WARDIN,
Foreman.

[Endorsed]: No. 1874. U. S. Dist. Court, Dist. of Nevada. Clyde W. Houston vs. Nevada Northern Ry. Co. Verdict. Filed December 11, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy.

In the District Court of the United States, for the District of Nevada.

No. 1874.

CLYDE W. HOUSTON,

Plff.,

vs.

NEVADA NORTHERN RAILWAY CO., a Corporation,

Deft.

Judgment.

This action came on regularly for trial, the said parties appearing and being represented by their attorneys: Messrs. Dixon and Miller, of counsel for the plaintiff; Messrs. Chandler and Quayle, for the defendant.

A jury of twelve persons was regularly impaneled and sworn to try the issue. Witnesses upon the part of plaintiff and defendant were sworn and examined, documentary evidence introduced, and after hearing the evidence, the argument of counsel and the instructions [8] of the Court, the jury retired to consider their verdict and subsequently returned into court with a verdict, signed by the foreman, and being called, answer to their names and say: "We, the jury in the above-entitled case, find for the plaintiff and assess the damages in the sum of $12,500.00."

Wherefore, by reason of the law and the premises, it is ordered, adjudged and decreed, that the plaintiff have and recover of and from the said defendant, the sum of Twelve Thousand Five Hundred ($12,500.00) Dollars, with interest thereon at the rate of seven per cent per annum from the date hereof until paid, together with plaintiff's costs and disbursements incurred in this action, taxed at $201.60.

Dated December 11th, 1915.

Attest: T. J. EDWARDS,
Clerk.

By H. D. Edwards,
Deputy.

[Endorsed]: No. 1874. U. S. District Court, District of Nevada. Clyde W. Houston, Plff., vs. Nevada Northern Railway Co., a Corporation, Deft. Judgment. Filed December 11th, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy.

United States of America,
District of Nevada,—ss.

I, T. J. Edwards, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that the above and foregoing is a full, true and correct copy of the original judgment now on file and of record in my office, and that the above and foregoing constitutes the judgment-roll in this action.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said court, at my office in Carson City, this the eleventh day of December, A. D. 1915, and in the year of our Independence the 140th.

[Seal] T. J. EDWARDS,
Clerk.
By H. D. Edwards,
Deputy.

(Ten Cent Revenue Stamp Cancelled.)

[Endorsed]: No. 1874. U. S. District Court, District of Nevada. Clyde W. Houston vs. Nevada Northern Railway Co., a Corpn. Judgment-roll. Filed December 11th, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. [9]

In the District Court of the United States, in and for the District of Nevada.

No. 1874.

CLYDE W. HOUSTON,

Plaintiff,

vs.

NEVADA NORTHERN RAILWAY COMPANY, a Corporation,

Defendant.

Opinion on Motion to Remand.

DIXON & MILLER, for Plaintiff.

CHANDLER & QUAYLE, for Defendant.

FARRINGTON, District Judge:

It is conceded that defendant at the time this action was commenced was a corporation organized under the laws of the State of Maine. The question to be determined is the citizenship of the plaintiff.

In his complaint, filed October 7, 1914, plaintiff avers that he "is not a resident or a citizen of the State of Nevada; but is a citizen and resident of another State." In defendant's petition for removal, verified by its superintendent T. J. Duddleson, filed November 18, 1914, it is stated on information and belief that Houston "at the time of the commencement of this action, was, and has ever since been, and still is a citizen of the State of Nevada."

The recited facts on which this belief is based, are: First: From March 24, 1913, to September 23, 1914, plaintiff "resided with his family at East Ely, Ne-

vada, at which place the said plaintiff during all of said time had his domicile." Second: "On August 10, 1914, said plaintiff * * * registered at said East Ely as an elector to vote at the primary election which was to be held throughout the State of Nevada on September 1st, 1914, for the nomination of candidates for state and county officers." Third: "On September 1, 1914, said plaintiff * * * voted at said primary election in said East Ely."

If these averments were not true, plaintiff should have denied them. He has never done so, consequently they must be accepted as true. [10]

Kentucky vs. Powers, 201 U. S. 1, 33.

The complaint was sworn to in Weber County, Utah, October 5, 1914. In it, plaintiff states that prior to March 19, 1914, he was engaged and employed by defendant, and on that day was injured while he was actually engaged as a brakeman on a railroad train carrying ore from Copper Flat to McGill, in White Pine County, Nevada.

In his affidavit on Motion to Remand, filed on the 23d of the following December, plaintiff states that he was born "and continued to reside in" Kansas, until about October 10, 1910; "while so residing in Kansas he voted at three elections." Where he was born and lived in the State of Kansas does not appear. Neither does he state where or at what character of elections in Kansas he voted. Leaving Kansas, he went to Missouri. He arrived in Nevada about March 21, 1913, and within a few days thereafter was employed by defendant as a brakeman.

I therefore find that plaintiff lived with his fam-

ily in East Ely, Nevada, for about eighteen months, that he registered there in August, 1913, and in the following month voted at the State-wide primaries for the nomination of candidates for State and county officers. If he so voted, he must have satisfied the registry agent that he was then a qualified elector. We must assume that he was at this time an actual resident and citizen of East Ely; otherwise he would not have been entitled to vote at the primary election. It will not be presumed that he voted illegally.

Thompson vs. Ward, 199 Fed. 861.

He says he came to Nevada with the intention of remaining as long as he could obtain and hold satisfactory employment with defendant, or some other railroad company. It is not essential that his intention should have been to live in Nevada permanently; it is sufficient if he intended to reside here for an indefinite time; that is, for a time to which he did not then contemplate an end.

Williamson vs. Osenton, 232 U. S. 619, 624.

Or, as it is stated in United States vs. Chong Sam, 47 Fed. 878, 895: "It is actual residence with the intention of remaining indefinitely, not [11] a purpose of permanent residence, that is essential to the acquisition of a new domicile."

In the case of Succession of Steers, 18 So. 505, it appeared that Steers, whose domicile was in question, came originally from Otsego County, New York, and located at Shreveport, Louisiana. This was in 1870. In 1876 he moved to New Orleans and engaged in business there, living most of each year

but going to Otsego County, New York, every summer. In 1883 he bought a place called "Lakeland," in Otsego County, and fixed it up in a manner indicating he expected to spend his declining years there. Thereafter his wife seems to have regarded Lakeland as the home, but Steers continued to live for the greater part of each year in New Orleans and to do business and vote there. During all of the time, however, he contemplated going back to New York at some future time. Said the Court: "Applying the law to the facts in the record, we are to ascertain whether Schuyler B. Steers acquired a domicile in Louisiana, and, if so, did he abandon it, and acquire a domicile in Otsego County, N. Y. The character of the residence can form no important part in fixing the domicile, unless it is of that character which rebuts the presumption of a fixed intention to remain. It is therefore immaterial whether he lived in a hired house, boarding-house, or his own dwelling. If it was his intention to remain permanently in Louisiana, and his declarations and his act show that he intended to remain for an indefinite period, as a place of present fixed domicile, it will constitute his domicile, though he may have had an idea, at some future time, of returning to the original domicile. * * * When Steers voted in Shreveport he under oath declared he was a citizen of Louisiana. * * *

"Voting may not be conclusive evidence of domicile, as it may be shown that the vote was fraudulently cast. But when there is no question of fraud, and it is the act of the party, supported by his oath, as to the right to vote, it is an important fact, in con-

nection with residence, to fix the intention as to domicile. State vs. Steele, 33 La. Ann. 910; McKowen vs. McGuire, 15 La. Ann. 639.

"It is certain he could not acquire a domicile elsewhere while he [12] continued to reside in New Orleans, keeping up his home, his business, and exercising his political rights. During his residence in New Orleans all the circumstances usually relied upon to establish a domicile occurred his repeated declarations, the payment of personal taxes, the establishment of a place of business, the acquisition of a home, and the exercise of political rights. Mitchell vs. U. S., 21 Wall, 350. Having acquired a domicile in New Orleans, it is presumed to continue until it is shown to have changed. The facts do not show that he acquired a new domicile in Otsego County, N. Y. It is not shown that he resided there with the intention to remain permanently. Id.: Vault Co. vs. Preston, (Ky.) 28 S. W. 658."

Plaintiff further states in his affidavit "that on account of changing employment he never intended to acquire and did not, as he has been advised and believes, ever become a citizen of any other State than the State of Kansas."

If by this plaintiff meant that he never was a citizen of any other State than Kansas, it is strange he did not say so in his complaint, instead of declaring that he "is not a resident or citizen of the State of Nevada; but is a citizen and resident of another State."

It is also a significant circumstance in this connection that in the seventh paragraph of his notice of

motion to remand, it is said that he "was, and now is, a citizen of the State of Kansas, or a citizen of the State of Utah."

The last paragraph of his affidavit is as follows: "That after deponent received the injuries complained of in his complaint, he went to the State of Kansas for treatment and care and remained there a number of months; that plaintiff has now returned to the State of Kansas and has no intention of returning to the State of Nevada to live."

Nowhere in the record does plaintiff declare that at the time this action was commenced his intention was not to return to Nevada, or that he intended to acquire a residence in the State of Kansas, or to reside there permanently, or for any period, definite or indefinite.

Evidently both client and counsel have been somewhat uncertain as to [13] whether to claim citizenship in Kansas or in Utah.

In my judgment plaintiff acquired a residence in Nevada, and became a citizen of Nevada at some time before the action was commenced. Having acquired a domicile in this State, it will continue until another is acquired elsewhere. Once established, this status is presumed to continue until the contrary is shown.

Thompson vs. Ward, 199 Fed. 861, 863.

The mere fact that Houston left the State of Nevada, is in Kansas, and does not now intend to return, cannot affect his status for jurisdictional purposes in this proceeding. It is his citizenship at the time suit was brought which determines the jurisdiction of this court. The fact, if it be a fact, that he

is now an actual, *bona fide* resident and citizen of Kansas, is wholly immaterial, if his residence and citizenship were not transferred to that State until after the cause was removed to this forum. In order to have effected such a transfer, he must have moved his residence to Kansas with the intention of remaining there permanently, or for an indefinite time. There is nothing in the record which shows that he had done either before the action was removed.

The motion to remand will be denied.

[Indorsed]: No. 1974. In the District Court of the United States, in and for the District of Nevada. Clyde W. Houston, Plaintiff, vs. Nevada Northern Railway Company, a Corporation, Defendant. Opinion on Motion to Remand. Filed February 15th, 1915. T. J. Edwards, Clerk. [14]

In the United States District Court for the District of Nevada, Ninth Circuit.

CLYDE W. HOUSTON,

Plaintiff,

vs.

NEVADA NORTHERN RAILWAY COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that the above-entitled cause came on to be tried before the said court and the Honorable E. S. Farrington, Judge thereof, then and there presiding, on the sixth day of December,

1915, at ten o'clock A. M. of said day, plaintiff appearing by his attorneys, Messrs. Dixon and Miller, and defendant appearing by its attorneys, Messrs. Chandler and Quayle. A jury of twelve men was thereupon drawn, selected and sworn to try said cause and opening statements to the jury were made by counsel for the respective parties. In his opening statement in behalf of defendant Mr. Charles S. Chandler, one of defendant's attorneys, stated in substance that the collision involved in the case occurred by reason of the fact that one of defendant's shop employees took an engine which had been undergoing repairs in defendant's repair-shops out of the shops and on to the main line of defendant's railroad for the purpose of trying it out; that this was done without orders from defendant's train despatcher and without his knowledge and without the knowledge of any other official of defendant company; that, in effect, the shop employee, of his own motion, stole the engine out; that while he was running the engine on defendant's main line of railroad a head-on collision occurred between that engine and one of defendant's ore trains on which plaintiff was employed as a brakeman; that plaintiff seeing the collision impending jumped from the engine of the ore train and sustained [15] some injuries; that while the action of the shop employee in so taking the engine out could not have been anticipated and consequently could not have been prevented by the defendant, nevertheless under the statutes of Nevada the defendant must accept the legal responsibility for any damage actually resulting to the plaintiff on account of this act of the

shop employee; that defendant does not seek to evade this responsibility, but stands ready to pay plaintiff such damage as he has actually sustained as a result of the accident, but it is not willing to pay damages that have not been sustained; that plaintiff claims that he is permanently injured and permanently incapacitated from performing manual labor and seeks to recover damages in the sum of $50,000; while defendant claims and expects to show that plaintiff never was injured beyond a few bruises and scratches and had fully recovered within a few days—at least within thirty days after the accident and is not incapacitated from performing manual labor or the duties of a brakeman; that he is malingering and faking alleged injuries in the hope of deceiving the jury into awarding him heavy damages; that this is the issue to be determined in this case; that defendant is willing to pay for actual injuries, but is not willing to be "humbugged" into paying for injuries that are dissembled and do not exist.

Thereupon evidence was offered and received on the part of the plaintiff and defendant respectively, the taking of such testimony extending over a continuous period of six days and being concluded and the cause argued, the jury instructed and the cause submitted to it on the eleventh day of December, 1915; and on said day the jury rendered its verdict in favor of plaintiff and against the defendant for the sum of $12,500.

Owing to defendant's acknowledgment of legal responsibility for such damages as plaintiff had actually sustained, the evidence was restricted to the

question of the extent and permanency of the injuries received by the plaintiff as a result of the collision. [16]

Testimony of Clyde W. Houston, in His Own Behalf.

PLAINTIFF was called as witness in his own behalf and testified in substance that:

On instructions from the engineer he jumped from the engine of the ore train just before the collision occurred and the first thing he knew after that he found himself out in the country about fifty yards from the tract and from the caboose. He went to the caboose where he met the fireman and a stranger who had been riding on the train, told them he thought the engineer jumped. Shortly afterwards he heard the engineer groaning and told the stranger to get help and get the engineer into the caboose and got a red light and fusee and went back and flagged. On getting back, he set his red light in the middle of the track, and laid down beside the track. Subsequently Brakeman Montgomery came back, took the red light and fusee and went down the track farther and they cut the caboose off the train, pushed it down to where plaintiff was and helped him into the caboose and he was subsequently taken to Avenue F, a little station near East Ely, and from there to the defendant's hospital at East Ely, where he was given a bath and put to bed. He was in the hospital about a week, was examined once by Dr. Early, the defendant's chief surgeon, and the only treatment he received was some medicine rubbed on his back by Dr. Early. His physical condition immediately after

(Testimony of Clyde W. Houston.)

the collision was that he was excited and nervous and he didn't know how he did feel. When he got to the hospital he was very nervous, his knees were swollen, his face was scratched, his neck and back were swollen and he had considerable pain in his back and side. About a week after leaving the hospital he was taken to Salt Lake where an X-ray picture was taken of his back and he was examined by Dr. Snyder. At this period his back hurt him all the time and he was in a very nervous condition; was unable to walk without the aid of a cane because of his right leg; his eyes bothered him and he could read nothing but the headlines. He then returned to Ely where he was examined by Dr. Holmquist, who gave him some medicine and advised him to go to a nerve specialist at San Francisco and to a lower climate. Shortly afterwards [17] he went to the home of his father and mother at Ellis, Kansas, where he received osteopathic and chiropractic treatment for three months, under which his condition improved. He then returned to East Ely, Nevada, and worked one shift of eight hours on one of defendant's passenger trains, but didn't work longer than one day because he wasn't able to on account of his nervousness; the jar and the jolting and getting on and off the train affected him so he couldn't stand it. After returning to East Ely he got worse all the time; had pains in his stomach and back; his legs cramped and went to sleep; he was unable to read any length of time and was nervous and all unstrung.

(Testimony of Clyde W. Houston.)

Since the injury he has been unable to eat anything except eggs, toast, soup, mush and stuff like that; eating heartier food made the pains in his stomach lots worse; he has never had a movement of the bowels without physic since he was injured. Has done no work since the injury except the eight hours above mentioned and has not earned any money since then. The physicians in Ellis, Kansas, advised him not to work for a long time. If he is riding on a train and they come to a quick stop, or anything like that, it makes him awfully nervous; in standing around the streets where there are automobiles, it makes him very nervous. He has suffered from pains in his stomach and from headaches up to this time. The stomach pains are there all the time and the headaches occur once or twice a week, sometimes once in two weeks. They are very, very severe and occur when he eats anything that doesn't agree with him. Before the collision occurred his physical condition was good. He worked all the time and never had any sickness. He weighed one hundred fifty-five pounds and now weighs one hundred twenty-four pounds.

He walked with extreme difficulty and pain while at the hospital. This difficulty and pain in walking increased from the time he left the hospital until he went to Ellis, Kansas, but improved there to such an extent that he was barely able to walk around without a cane. He suffered continuous pain in walking while at Ellis. His [18] difficulty in walking increased again after he worked the one shift in

(Testimony of Clyde W. Houston.)

August, 1914, but within a week or ten days recovered to the condition that existed at the time he left Ellis and has ever since remained about the same. He has not been able to walk fast at all since then. He gets tired very easily, doesn't know how far he can walk but has at least eight or ten times since the injury walked from his house in East Ely to the Northern Hotel in Ely, traversing some hills, in about thirty-five or forty minutes time, although he never timed it. (It was shown by other testimony that this distance was about a mile and a half.) This walk was difficult for him; he walked slowly and with pain. By walking five or six blocks and waiting not over an hour he could have taken a suburban train. He has walked from his home to Ely and then walked back probably seven or eight times.

Just before this action was commenced he went to Ogden, Utah, some time in September, 1914, and was there when he verified the complaint. He remained in Ogden about two months. He stayed with his aunt in Ogden and while there walked to the business center of the town sometimes once a day and sometimes not for two or three days. He has walked it twice in one day. Sometimes he rode but he walked oftener than he rode. It was not easy for him to walk this distance. He walked with difficulty and sometimes his legs would cramp. When this happened he would sometimes stop and rest. He was not able to walk without limping while in Ogden. He was sick most of the time he was in Ogden.

(Testimony of Clyde W. Houston.)

Eating heavy food invariably makes him sick. He has pains in his stomach all the time but they get very much worse when he eats anything heavy; the more severe pains last from eight to twenty-four hours. They commence immediately after eating heavy food—sometimes while he is eating it. This applies to steak—sometimes to oysters and sometimes not. Intoxicating liquors have the same effect. He quit drinking them more than a year ago for that reason. He has been put to bed for two or three days just from drinking one glass of whiskey. He feels sick the next day after eating a steak—belches [19] up gas on his lungs and has bearing down pains in his stomach. He has eaten heavy stuff in Ogden and it always made him sick—at least within three hours. The pains always commenced and would last from ten to twenty-four hours—sometimes a week. Since the accident he has been made sick by eating heavy stuff, such sickness lasting a week at least a hundred times. Doesn't mean that he has been in bed that long, that many times—means he has those spells from eating heavy food. He cannot state for sure whether there have been as many as a hundred occasions when such more severe pains and sickness lasted a week. It isn't always heavy stuff that makes him sick—sometimes anything he eats has that effect. Sometimes it comes when he doesn't eat at all. There are times when he eats heavy stuff and doesn't have the sickness—not those severe pains. Any time he eats heavy food it hurts him. The pain always comes

(Testimony of Clyde W. Houston.)

after eating heavy stuff. Didn't understand the question when he said that sometimes he ate heavy food and it didn't affect him. He has no appetite or desire for heavy food. It is rather repulsive to him.

Intoxicating liquors form gas on his stomach and puts him in such a condition that he cannot eat anything. (Tr. 120.)

He did not make any effort to secure work while in Ogden. (Tr. 36.) He did not tell Senator Jake Fulmer in Ogden in October, 1914, that he had applied for or expected to get a job in a canning factory in Ogden, or that he had put in an application for a job as switchman with a railroad company there. (Tr. 116.)

Testimony of Dr. M. R. Walker, for Plaintiff.

Dr. M. R. WALKER, a medical witness on the part of the plaintiff, testified in substance that:

He examined the plaintiff about the middle of November, 1915. He made a physical examination consisting solely of examining his back, including his spine by palpation, and examining his abdominal region by palpation and percussion. He found very tender spots and tender nerves along the spine, but otherwise found nothing wrong with the spine. He found certain muscles of the back that were evidently very painful, were tender. He had to rely very largely on the patient to determine whether any spot was tender, although he tried to be on [20] his guard against fraud. The physical ex-

(Testimony of Dr. M. R. Walker.)

amination of the abdomen was not conclusive. He formed the idea (from an involuntary contraction of the muscles found on deep pressure) that the abdominal organs were not in a normal condition but was not satisfied with that examination alone. That was all he did in the way of a physical examination. He then made an X-ray examination of the stomach and intestines (pp. 73–77). On the X-ray examination he found dilation and a ptosis of the stomach and also of the caecum (p. 56). He diagnosed the condition as nervous exhaustion, the result of a severe shock (the accident in question) stated by Houston in giving his history (p. 55). The whole condition of the man was that of a neurasthenic, which means simply a nervous exhaustion and general debility. There was a general lack of nervous tone, "the man was nervous, an inability for any long-continued position or line of endeavor or thought and more or less of a tremor" (p. 56). The mental symptoms of neurasthenia are usually a nervous exhaustion, inability to pursue a given line of thought or to carry out a given plan; it is generally a weakness and loss of power; there may be in some individuals apparent or real deterioration of the mind, although that is not so common as merely an exhaustion and an inability to carry out the given line of thought or action (p. 57). The ptosis of the abdominal organs was a result of the nervous condition, the exhaustion of the nerves causing the ligaments supporting the abdominal organs to lose their tone and to become elongated, like a piece of rubber

(Testimony of Dr. M. R. Walker.)

that has lost its elasticity, and so allowing the organs to drop down (pp. 60–62). It is the usual thing for stomach and colon displacements to result from a derangement of the nervous system (p. 77). There is always some nervous disturbance preceding such displacements unless in the case which is exceedingly rare, of an injury so great as to tear the organs out of place, which brings it into another class (p. 85). Aside from Houston's statements there is no means of estimating how long the ptosis has existed (p. 77). Witness is acquainted to a limited extent with the physical efforts to be put forth by railroad brakemen; **[21]** has observed a good many brakemen. From the condition in which he finds Mr. Houston at this time, and from the knowledge he has of the physical effort necessary to be made by railway brakemen, he would not expect that Mr. Houston would be able to continue or resume his work as a railway brakeman. Witness testified that from his examination of Mr. Houston and from his nervous condition, he would expect the prospects of his ultimate recovery to be a very doubtful question; that in these cases it is possible that by appropriate care and treatment a man may regain considerable of his strength, but his observation and experience has been that the majority of them never recover but a small degree of their original strength.

The defendant called as witnesses, among others, the conductor, rear brakeman and the fireman of the ore train on which plaintiff was riding just prior to

(Testimony of Dr. M. R. Walker.)

the collision, who testified as to the occurrences immediately after the collision, both at the scene of the accident and at the hospital, their testimony being to the effect that after the collision the plaintiff found the engineer (who had jumped from the opposite side of the engine—from the one from which plaintiff jumped) and then walked up to the front of the ore train (which consisted of twenty-one ore cars each about thirty-two feet in length besides the engine and caboose), told the conductor that he had found the engineer, walked back to the rear of the train with the conductor, assisted in carrying the engineer into the caboose, then walked back up the track, probably about a quarter of a mile to flag and remain there until he was relieved by brakeman Montgomery and then walked back to the caboose at the rear of the ore train, and rode in the cupola of the caboose when the passenger train backed up and hauled the caboose to Avenue F station; that the hospital ambulance was at Avenue F. to take them to the hospital, but plaintiff protested against going to the hospital, saying he was not hurt and would go home; that he was prevailed upon to go to the hospital, at which place the conductor testified, plaintiff again protested that he was not hurt beyond being shaken up and stiff and would go home, but he was **[22]** not permitted to do so, that plaintiff further protested against being assisted to take a bath and was left to go to the bathroom alone to take his own bath.

(Testimony of Dr. M. R. Walker.)

The conductor also testified that when plaintiff went with him from the engine to the rear of the train to find the engineer, they "travelled along pretty fast to get back there" (p. 148); that plaintiff appeared to have no difficulty in walking at the wreck "only that he did limp a little" (p. 149). He further testified that at the hospital a day or two after the accident plaintiff stated to him that, "Bill (the engineer) and I has got it fixed up what we are going to do, we are going to make the company pay for this."

Testimony of M. L. Douglas, for Defendant.

M. L. DOUGLAS, in defendant's employ as a brakeman and a witness in behalf of defendant, testified that he saw plaintiff at the hospital the next day after the collision and that plaintiff said that the engineer was the only one that was hurt severely; that he (plaintiff) wanted to go home and didn't know what they were keeping him over there for; that Houston said he "was a little sore and stiff from getting off the engine, but otherwise he didn't think there was anything wrong with him" (p. 143); that "the boys all had it on the Company and he was going to make it strong on his part and they would have to come across with him" (p. 142). This witness also testified to having met plaintiff on the occasion of plaintiff's return from Ellis, Kansas, and that plaintiff did not limp or have any apparent difficulty in walking, and said he was feeling "pretty good"; that he met plaintiff on a subsequent occa-

(Testimony of M. L. Douglas.)

sion on the train between Ely and East Ely and they talked about when plaintiff might be able to go to work and plaintiff said "they had to pay him, it wasn't a job that he wanted, it was money that he was after; that he could get a job any time." Plaintiff did not limp on this occasion. This was before plaintiff worked the shift on the passenger train. On all of the many occasions the witness saw plaintiff after the collision, with the exception of the two mentioned, the plaintiff limped. Witness had a talk with plaintiff (about two weeks after plaintiff worked the shift on the passenger train) as to the reason plaintiff **[23]** did not continue to work, and plaintiff said "it wasn't a job he wanted, that they would have to pay him or words to that effect."

Testimony of H. A. Newhauser, for Defendant.

H. A. NEWHAUSER, one of defendant's brakemen, a witness in behalf of defendant, testified that he had seen the plaintiff since the collision when plaintiff walked lame and had seen him when he didn't walk lame; that on one occasion he saw the plaintiff come out of a grocery store with a twelve or fifteen pound paper sack in each hand and carry them up the hill toward plaintiff's home in East Ely, which was five or six blocks away, and he noticed that plaintiff didn't walk lame; that in the latter part of the summer of 1914 and after plaintiff had worked the shift on the passenger train witness had a talk with plaintiff during the course of which plaintiff said "that he wanted to go to work and he

(Testimony of H. A. Newhauser.)

didn't want to go to work, and he says, 'I don't believe I will go to work,' he says, 'I believe I will make them pay me the money,' he says, 'that is what I want'; and he says, 'Really,' he says, 'I don't want to go to work.' Now that is just how it came up; he says, 'I really don't want to go to work, but,' he says, 'I want the money; it is coming to me and I am going after it'; he says, 'I would really rather have the money than the job.' ''

Testimony of Jacob H. Fulmer, for Defendant.

JACOB H. FULMER, a witness in behalf of defendant, testified in substance as follows:

I am employed as a conductor for the Nevada Northern Railway Company; have known the plaintiff about three years; I met him in Ogden, Utah, on October 17, 1914. I was standing on the corner of 25th St. and Capital Avenue, and I saw him in company with two other gentlemen come around the corner; it was about seven-thirty in the evening, and I thought I recognized Houston, and I followed them to a political meeting, where they stopped, and I stopped and talked with him. They were walking at a good rapid rate of speed when they came around the corner. It was about a block, perhaps a little more, south, from where they passed me to where I overtook them. The blocks run eight blocks to the mile. I spoke to Mr. Houston and he introduced me to his two cousins; he said they were his cousins, and **[24]** he and I walked around town most of the evening, up until twelve o'clock that night. He did

(Testimony of Jacob H. Fulmer.)

not seem to have any difficulty in walking when I first saw him come around the corner with his two cousins, and had no difficulty in walking that I could notice during the rest of the evening. We had, I should judge, half a dozen or more drinks of whiskey together that evening. I don't recall sitting down that evening at all. Houston during that time did not complain of fatigue, to me. We walked around at a natural rate of speed, about the same as anyone would walk around town. We walked west on Capital Avenue, or west from the corner of Twenty-fifth Street and Capital Avenue; we was all over town, practically; different places; when we felt as though we wanted a drink we would drop in and take a drink. We separated at the corner of Twenty-fifth Street, and Houston and his two cousins went home. The two cousins were with us only a little of the time. Houston and I were walking around most of the time until we met them just prior to leaving for home. Houston told me he lived on Thirty-fifth St. and said he was in the habit of walking home, that he was in the habit of walking back and forth. That would be ten blocks from where I left him that night. The blocks run eight to the mile. The next day I met Houston about a block east of Twenty-fifth Street; he was walking west and I had been walking east on the opposite side of the street, and when I saw him, I turned and walked about west until he came up to the corner of Twenty-fifth Street. I observed him walking before we met; he was walking just as natural as he ever walked,

(Testimony of Jacob H. Fulmer.)

and was walking along at a fair rate of speed. This was perhaps about nine-thirty of the 18th. After meeting him we walked around awhile, and finally we met Al Graves, whom we knew, from Ely, he had worked there. We walked around about the same as we had the day previous, drank some and ate some. We ate, I should judge, about ten o'clock; we both ate a dozen raw oysters each. I should judge they would be eastern oysters, they were good-sized, about two inches in diameter each. Besides the oysters we had a bottle of beer and some crackers. After meeting Graves we went to a **[25]** place about halfway between Twenty-fifth Street and the depot. We were looking for a place to get a drink, that is, a saloon, and a place to sit down, and Al said he knew of a place we could got into, and he took us down to this hotel. I think it is a small hotel; and we went up a flight of stairs and through the office, and went down a flight of stairs into the basement, into the bar-room, or the saloon. I should judge we were there about two hours. We were drinking most of the time and talking. There was quite a number of railroad men in there besides us. After we came out of there I think Mr. Graves left us, and Mr. Houston went to my hotel with me, and I got my grip, and he accompanied me to the Bamberger depot, and I left for Salt Lake. We did not take the street-cars at all. It was about three blocks from where we met Mr. Graves to the hotel where we had the drinks. My hotel is down at the depot, which is over half a mile, pretty close to three-

(Testimony of Jacob H. Fulmer.)

quarters of a mile, I should judge, from Washington Ave. The Bamberger depot is about two blocks from my hotel. I think we met Mr. Graves about twelve o'clock and Mr. Houston and I had been continuously together since I had met him in the morning and had been on our feet all of the time with the exception of when we were eating our oysters. I did not notice that Houston walked lame that day. He did not walk with any apparent difficulty, other than he kind of carried his neck a little stiff the same as always. He always carried his neck to one side as long as I remember knowing him. He did not complain to me of any pain or any weakness or of any fatigue, and I did not notice that he had any difficulty in going up and down the steps I have spoken of. If he had had any difficulty I think I would have noticed it. I knew that Mr. Houston at that time had commenced suit against the Nevada Northern Railway Company. I saw him again on October 20th, after returning from Salt Lake. I met him in front of the Falstaff Restaurant on Washington Avenue about ten-thirty in the morning. On the previous occasion, the 18th, Houston and I had a half dozen or more drinks of whiskey together. He did not drink anything else that I saw except that he drank beer **[26]** with his oysters. On the 20th, after meeting him about ten-thirty, we were together until about six o'clock in the evening. He had lunch with me and we were walking around the town the rest of the time except that we sat down at the corner of Twenty-fifth Street and Washington

(Testimony of Jacob H. Fulmer.)

Avenue for about *a* hour. For lunch we each ate a fair-sized T-bone steak. Houston seemed to clean up all of his steak. Both of us ate heartily. Besides the steak we had combination salad between us and bread and butter and potatoes. We were drinking more or less all the time that day and perhaps had more than a half a dozen drinks. We were walking around town, just strolling around. We walked west on Washington Avenue I should judge half or three-quarters of a mile and returned. Houston did not become intoxicated that day that I could tell or on either of the other two occasions.

On one of these three occasions I had a conversation with him with respect to his seeking employment. He told me that he had been promised a job with the canning factory in Ogden and also said that he had been down to the Southern Pacific shops to secure work but that they were full handed and very little work going on. He said that he had applied for a position as switchman at the S. P. yards.

I saw plaintiff Houston in East Ely, Nevada, after he had returned from Ellis, Kansas and prior to the occasions of which I have been speaking. I saw him several times. He was at my house several different times. He walked with a kind of a side motion. His neck seemed to be stiff. He did not walk that way all of the time. I remember particular occasions on which he did not walk that way, but I cannot furnish dates. I have noticed him on the street when he did not seem to be walking with the side

(Testimony of Jacob H. Fulmer.)

motion. I saw him on the occasion when he worked the shift on the passenger train after his return from Ellis, Kansas. I rode up on the train to Ely, the train on which Houston was working. I observed him at that time. He walked with a kind of a side motion; he was carrying a lantern; his head was kind of—neck kind of turned to one side. I saw him get on at East Ely and off at Ely. He did not have any apparent difficulty [27] in doing so. The way he held his head did not differ from the way he held his head before the accident.

I saw the plaintiff, Houston, intoxicated subsequent to the time of the accident, in the Antler Saloon in East Ely, Nevada. It was shortly after he returned from Kansas. When I saw him in Ogden he told me he felt very good. The most extensive conversation we had in Ogden was on the 20th when we were seated on the curb at Twenty-fifth Street. He told me that he would have settled with the company had they given him a thousand dollars and a lifetime job, also that he had been examined in Ogden by two different doctors and that he was to go to Reno to be examined by a specialist on request of his attorney. He said he felt good and was sleeping all right.

Cross-examination.

I saw Mr. Houston in Ogden on October 17th. I saw Mr. Houston the first day in Ogden, on October 17th. That was Saturday. I got to Ogden in the evening of the same day and remained there until the next afternoon at two-thirty, then went to Salt Lake.

(Testimony of Jacob H. Fulmer.)

I stayed in Salt Lake until the morning of the 20th. I did not see Mr. Houston on the 19th, and the 18th was Sunday. After the 20th I did not see him again until I saw him in Reno. I left Ogden I think on the 21st and returned to Ely. During this time I still held my job with the defendant, but was laying off. I worked for the defendant afterwards. I am acquainted with Rule "G" of the Nevada Northern Railway Company. That is to prevent any man from drinking while on duty. The rule states that a man shall not drink while on or off duty. I violated that rule during those four days, but was not discharged in consequence. Under Rule "G" you are subject to discharge for a violation of it. I saw Houston on the 17th about seven-thirty in the evening. I have no memorandum of the time, but remember going down on the 17th and seeing him in the evening of the same day. I informed Mr. Cannon (defendant's general manager) of these conversations with Houston, I should judge, in about ten days, a week or ten days after I returned from Ogden. It is not a fact that the Nevada Northern [28] Railway Company paid my expenses to Ogden on that trip. I saw Mr. Houston about seven-thirty —an hour and a half or two hours after I got to town. I stopped at a hotel right across the street from the depot—the S. P. depot. I went immediately to my hotel, went to my room and washed, went to dine and walked up town. I met Mr. Houston at the corner of Twenty-fifth Street and Washington Avenue—that is one of the main streets and corners of the town

(Testimony of Jacob H. Fulmer.)

—and spent that evening until about twelve o'clock with Mr. Houston. I saw him the next morning, I should judge, between nine and ten o'clock. I got up Sunday morning about seven-thirty. I had not had my breakfast before coming up town. I had heard that Mr. Houston was in Ogden before I went there. I heard that from his brother's wife, who lived at my place. I saw Mr. Houston that evening coming around the corner of Twenty-fifth Street and followed him and overtook him after he stopped, and from there we walked around town. We were in several saloons. We went to a saloon, I should judge, probably within fifteen or twenty minutes after I met him. We walked in and took a drink but we did not stay in the saloon very long. We took one drink in that saloon—I bought it. After we went out of that saloon we walked around town and I should judge in about half an hour went to another saloon and had a drink there—I bought it. I am not sure where we went from that saloon, but I think we went to the picture show that evening. I am not sure that we went to the picture show right after we went out of the second saloon. We went into still another saloon. We were in several saloons that evening, I should think half a dozen. We had a drink in every saloon we went to. I bought the drinks. We went into saloons later in the evening—went to one prior to his going home and had a drink there—I bought it. We were in two or three saloons after the picture show was out. I should judge the picture show was out about nine-thirty. I don't know as a matter of

(Testimony of Jacob H. Fulmer.)

fact that the saloons at that time in Ogden closed at nine o'clock in the evening. I bought all of the drinks. I noticed Mr. Houston before I overtook him where he stopped, and also [29] afterwards, and also after the show. I noticed all evening how he was walking and acting. He had no difficulty in his walking to my notice. I noticed none whatever. If there had been a difficulty in his walking I would have noticed it. I was observing him. We separated at the corner of Twenty-fifth Street and Washington Avenue about midnight. I went to bed at my hotel. Got up next morning about seven-thirty and went up town before breakfast, and met Mr. Houston, I should judge, about ten o'clock. I first saw him east of Twenty-fifth Street on Washington Avenue, and we breakfasted together. I don't know whether Mr. Houston had had his breakfast. He ate with me at my expense. We had a bottle of beer. I bought it. That is the time we had the oysters. We each ordered a dozen oysters and we ate them and some crackers, and had a bottle of beer between us. It is not the fact that we ordered a half dozen oysters apiece and that Houston ate three of his. I am positive of that—just as positive as I am of any of the rest of my testimony. We walked around a whole lot on the evening of the 17th. I should judge we walked a mile perhaps. We were strolling around. I would not say we walked over a mile. We were in the picture show about an hour, I should judge. That would leave four hours for strolling around with little visits in the saloons between time. Dur-

(Testimony of Jacob H. Fulmer.)

ing this time Houston made no complaint to me of fatigue. During this time we did not sit down except the time in the picture show. He did not make any complaint of fatigue to anyone else that I heard. After we got our oysters Sunday morning we walked around town, I should judge, about an hour and we met Al Graves. We probably covered in that space of time a half a mile or more. I should say more than half a mile. It may have been more than a mile. I don't think we walked to exceed a mile. We had drinks that morning, in the hotel that Al Graves took us to, or the saloon that he took us to. That was between twelve and two o'clock. We had half a dozen drinks perhaps. Houston took at least six drinks of whiskey that day there, fair-sized drinks of whiskey, regular whiskey glasses. I should judge, about two fingers of whiskey [30] in the glass. I bought part of them. There were three or four other railroad men in the crowd who bought also. We were in the hotel, or saloon, I should judge, about two hours. Spent that time talking and drinking, then I went to my hotel and got my grip, about two o'clock, and went to Salt Lake. I returned from Salt Lake Monday morning about seven o'clock. I saw Houston that day in front of the Falstaff Restaurant, on Monday morning. We were together that day until about six o'clock in the evening. We had lunch. I invited him and paid for the lunch. We had half a dozen or more drinks that day. I would be safe in saying a half a dozen. We went perhaps into eight or ten different saloons. Did not

(Testimony of Jacob H. Fulmer.)

buy a drink in every place. Houston drank every time I did. I paid for them. I made a mistake as to the day. If that was Monday, the 19th, I did not see him on the 19th, it was Tuesday. I returned from Salt Lake on Tuesday, the 20th, not on Monday, the 19th. That was the day we had dinner and I saw him up until six o'clock in the evening, then I went to my hotel. Went to the picture show that evening. I parted from Mr. Houston at the corner of Twenty-fifth Street and Washington Avenue about six o'clock, and I did not see him any more that night nor the next day. I returned to Ely the next day. I had quite a conversation with Mr. Houston about his injuries and condition. Had such a conversation several times. The most extensive conversation we had was the day we were seated on the curb, the day I returned from Salt Lake. We sat there about an hour. We talked about other things too, a general visit, and during that conversation he said he would take a thousand dollars and a life job and settle. I did not ask him any questions as to what he would settle for, and did not in that conversation advise him to settle. I recall one instance when I so advised him. This was after he returned from Kansas to East Ely. He told me he was going down to settle and I told him I thought it was a very good idea—that was all I said. He never ate oysters in Ogden more than once. During this conversation on the curb he told me he had been promised a job. I don't think I asked him, I [31] think he voluntarily told me. All he said to me was not purely voluntary,

(Testimony of Jacob H. Fulmer.)

I asked him questions. He told me that he had been trying to get a job on the Southern Pacific as switchman. I don't recall saying anything in reply to that statement. He told me also that he had been promised a job in a canning factory in Ogden. He did not say what kind and did not tell me what wages he was going to get, or what kind of work he was going to do. I did not ask him any questions about it, only that he told me that he had been promised a job in a canning factory. I did not have any curiosity to know what wages he was going to get or what kind of work he was going to do. Houston always had a little side motion in his walk. I have known him almost three years. I noticed this side motion when I first saw him. I mean he always had it from the time I knew him. I first met him in East Ely at my home and I noticed this side motion then when he was walking around the house. He came to the house quite frequently. On the first occasion I noticed him walking across the room with this side motion and have noticed it ever since, almost every time I saw him. I have seen him carrying a cane in East Ely after the accident. He walked just as naturally in Ogden as he ever did. I don't recall ever seeing him walking without the side motion. On the occasion when I saw him on the train, when he was attempting to work on the passenger train, I got on the train at East Ely. Houston was acting as brakeman. When I first saw him he was standing on the steps. I role with him up to Ely, at Murry Street, and got off. He got off first. I was

(Testimony of Jacob H. Fulmer.)

on the rear end of the rear car when I saw him get off. He got off the rear end of the rear car. I was on the rear platform. He did not have any difficulty at all in getting down that I noticed. He had his hand on the railing. I saw him drunk in the Antler Saloon after he returned from Kansas in 1914. I could not state the month, but it was in the fall or late summer, before he went to Ogden. It may have been the fore part of October. It was right after dinner. I saw him lying on the pool-table in the Antler Saloon. I went in to get some tobacco. I had not seen him [32] before that day. He was drunk. I know he was because I saw him get up off the pool-table. I am satisfied he was drunk. He appeared to be drunk. That was my judgment. I did not help him get up. I was in the saloon there perhaps five minutes.

In Ogden he told me that he felt very good. That was in all conversations I had with him relating to the particular incident, and he told me he was sleeping all right. He said that more than once. I think I asked him on two different occasions how he slept. I also asked him how he was feeling. I was sent to Ogden by Mr. Cannon partially for the purpose of seeing what he was doing. It is not a fact that since this case was set for trial on November 23d that I have been in Reno on the same mission. I saw Mr. Houston in Reno about ten days ago, found him in a restaurant. Another witness for the defendant told me where he was and I went down there. I went and talked with him and invited him to have a drink.

(Testimony of Jacob H. Fulmer.)

I insisted on his taking a drink and he refused. He did not drink. He walked with me about two blocks. I don't recall asking him to go any further.

I talked to Mr. Cannon about this matter perhaps three or four days before I left Ely to go to Ogden on the 17th day of October, 1914, and I had a conversation with him after I returned and I reported to him what occurred. I think I told him about this drinking. I was not discharged by the Rule "G." I made a report to Mr. Cannon after I returned from Salt Lake; I guess there was more than one sheet of paper in that report—three or four sheets. I signed it and handed it to Mr. Cannon.

At this point the examination proceeds as follows:

Mr. MILLER.—Mr. Chandler, I want that report.

Mr. CHANDLER.—Well, the report I think is a sworn statement, and the original is not here, but we have a copy of it. We have a copy and will stipulate that it be considered the same as the original. I presume the witness in saying that he made a report refers to the sworn statement. [33]

WITNESS.—Yes.

Mr. DIXON.—He has testified that he made a written report.

Mr. CHANDLER.—This is not in the form of a written report; it is in the form of a statement.

WITNESS.—I made no written report myself.

Mr. MILLER.—(Q.) That statement contained the result of your trip to Ogden, didn't it?

A. Yes, sir.

(Testimony of Jacob H. Fulmer.)

Mr. MILLER.—While you are finding that I will proceed.

Mr. CHANDLER.—I think it is right here. (Hands paper to Mr. Miller.)

Mr. MILLER.—(Q.) Have you looked this statement over, Mr. Fullmer, since you came here to Carson City? A. No, sir.

Q. When did you see it last?

A. Is that the signed statement?

Q. This is a signed statement, "East Ely, Nevada, November 5, 1914. Statement made by Mr. J. H. Fullmer," and your name in pencil, with the word "Brakeman" under it; two typewritten pages. This appears to be a carbon copy; do you want to see if it is the one?

A. I would like to see that. (The paper is handed to the witness.)

WITNESS.—That is not my signature.

Q. That is not your signature? A. No, sir.

Q. Do you recognize the two pages to be the statement you refer to, Mr. Fullmer?

A. I think that is the statment.

Q. Where was that statement typewritten?

A. It was typewritten in Mr. Cannon's office.

Q. Was he present? A. He was.

Q. Who propounded the questions?

A. Mr. Cannon.

Q. Now, when did you last see this statement, or the matter contained in it?

A. I haven't seen that statement since I signed it, until now.

(Testimony of Jacob H. Fulmer.)

Q. Have you had a conversation with anybody about it?

A. I have talked with the attorneys for the defense.

Q. Since you came to Carson? A. Yes, some.

Q. I will ask you if you recognize this question and answer. (Reads:)

> "Mr. CANNON.—Will you please state what your conversation was? [34]
>
> "Mr. FULLMER.—I asked Mr. Houston how he felt; he said he felt very good; I asked him where he lived; he said on Thirty-fifth Street; I asked him if he had been working any; he said he had not, that he was unable to secure any work, that he had a promise of a job with a canning factory."

Do you recognize and recall that statement?

A. I do, yes.

Q. And is that correct? A. Yes, sir.

Q. And the matters and things stated in this answer, all occurred, did they? A. Yes, sir.

The testimony of the witness, reduced to narrative form, then continues as follows:

I spent I should judge about thirty or thirty-five dollars on the trip to Ogden and Salt Lake. I rode on a pass from East Ely to Cobre, and I rode on half-rate from Cobre to Ogden, and I paid my way from Ogden to Salt Lake, rode on half-fare from Ogden back to Cobre and on a pass from Cobre back to Ely. I can't say how much of that money I spent for drinks. Mr. Smoot and I spent some money together

(Testimony of Jacob H. Fulmer.)

in Salt Lake—probably ten or twelve dollars. I think I spent ten or twelve dollars for drinks on the entire trip, probably seven or eight dollars in Ogden. The dozen raw oysters cost me six bits a piece. I paid for Mr. Houston. The T-bone steaks cost me eighty cents apiece. I was recompensed for this expense. I was not paid for the time I spent in Ogden on that trip. I was laying off at the time I went to Ogden. That time was deducted from my monthly pay. I did not receive any other money, just my expenses. I don't think I received the whole of my expenses on that trip. I want to qualify my previous statement. That previous statement was whether or not I was furnished the money to go to Ogden, and I said no; but I was paid, my expenses were refunded to me after I returned from Odgen. I don't suppose that it was paid until after the next pay-day, after I made that statement. I should judge I bought twelve or fifteen, perhaps more, drinks for Clyde Houston in Ogden. It is not the fact that I deliberately [35] tried to get Houston drunk there. I was a brakeman at the time I went to Salt Lake and am a conductor now.

Redirect Examination.

My home in East Ely is in a small hotel, sixteen-room hotel, I have there. That is the house I refer to as being my home that Mr. Houston visited the first time I saw him. My promotion from brakeman to conductor was in the regular line of promotion. I am the twelfth oldest man working in the train ser-

(Testimony of Jacob H. Fulmer.)

vice of the Nevada Northern. My promotion was made about June, of 1915.

The following then took place:

Mr. CHANDLER.—I think, if the Court please, in view of the apparent importance that has been attached to this statement, that we shall offer it in evidence as a part of the redirect examination of Mr. Fullmer.

Mr. MILLER.—If the Court please, I object for this reason, not that it amounts to anything, but they already have the same testimony in by this witness, and if your Honor reads the statement, you will find the same questions; and not only that, but it is a copy, and not an identified copy.

Mr. CHANDLER.—It is the paper referred to in the cross-examination of Mr. Houston.

The COURT.—It seems to me that would be a statement they might introduce as against you, but can you introduce it in your own behalf?

Mr. CHANDLER.—I think we may in order to eliminate in the minds of the jury any impression that counsel may have left that this statement is prejudicial to the witness' statement.

The COURT.—Well, I would assume if he had found anything in that document that was to his advantage, he would have offered it; he would have been at liberty to offer it under the rule, but whether you can offer it is a serious question in my mind.

Mr. CHANDLER.—I will state frankly to the Court that I don't know whether the rules of evidence would permit it or not, but it seems to me to be a mat-

(Testimony of Jacob H. Fulmer.)

ter of justice that it should go in.

The COURT.—I don't think so. [36]

Mr. CHANDLER.—We note an exception to the Court's ruling.

The COURT.—You may have your exception.

Mr. CHANDLER.—That is all, Mr. Fulmer.

The statement referred to and which was excluded from evidence is in words and figures as follows:

"East Ely, Nevada, November 5th, 1914.

STATEMENT MADE BY MR. J. H. FULMER.

Mr. CANNON.—Mr. Fulmer, you were in Ogden recently, what date was it?

Mr. FULMER.—I was in Ogden on the 17th day of October, 1914.

Mr. CANNON.—You were there several days, weren't you?

Mr. FULMER.—Yes, sir.

Mr. CANNON.—While you were there, did you see C. W. Houston, who formerly was a brakeman for this company.

Mr. FULMER.—Yes, sir.

Mr. CANNON.—On what date did you first see him?

Mr. FULMER.—I saw him on the 17th of October.

Mr. CANNON.—Did he see you on the same date?

Mr. FULMER.—Yes, sir.

Mr. CANNON.—I wish you would state just what transpired.

Mr. FULMER.—I arrived in Ogden about 5:40 in the evening, on October 17th. About seven o'clock

(Testimony of Jacob H. Fulmer.)

in the evening, I was standing on the corner of Twenty-fifth St. and Washington Ave. Mr. Houston, in company with two other gentlemen, passed me. After they had passed, I thought I recognized Houston, and I followed them, a short distance behind, for about three blocks on Twenty-fifth St. towards the depot.

Mr. CANNON.—Did you catch up with him, and have a conversation with him?

Mr. FULMER.—They stopped and I caught up with them.

Mr. CANNON.—Will you please state what your conversation was?

Mr. FULMER.—I asked Mr. Houston how he felt; he said he felt very good. I asked him where he lived; he said out on Thirty-fifth St. I asked him if he had been working any; he said he had not; that he [37] was unable to secure any work, but he had the promise of a job with a canning factory.

Mr. CANNON.—Did he tell you what kind of work he was going to do for the canning factory?

Mr. FULMER.—No, sir; he did not. He just said that he had a promise of a job with a canning factory.

Mr. CANNON.—Did he indicate by his method or manner of walking, or otherwise, that he was not in first-class physical condition?

Mr. FULMER.—He apparently was as well as I ever saw him. He walked just as well as I ever saw him walk.

Mr. CANNON.—Did he have anything to say to

(Testimony of Jacob H. Fulmer.)

you in regard to the suit which he has instituted against this Company?

Mr. FULMER.—Not on that day.

Mr. CANNON.—Then you saw him subsequently?

Mr. FULMER.—I did.

Mr. CANNON.—Did he then have anything to say?

Mr. FULMER.—I saw him on the following day, the 18th. Was with him all the forenoon and up until 2:45 o'clock in the afternoon. He seemed to be in good spirits and good health.

Mr. CANNON.—Did he mention anything about the suit?

Mr. FULMER.—Not on that day.

Mr. CANNON.—That is, not on the 18th?

Mr. FULMER.—No, sir.

Mr. CANNON.—Did he have anything to say about the suit on the following day, or on any subsequent day?

Mr. FULMER.—He did, yes; on the 20th.

Mr. CANNON.—Will you please state what he said.

Mr. FULMER.—He and I were walking around that day and finally sat down on the curb, facing Twenty-fifth St, and Washington Ave. He told me that if the Nevada Northern Railway Company had given him $1,000.00 and a lifelong job, he would have settled with them.

Mr. CANNON.—Your conversation with him, and your association with him would not convince you that he was incapacitated for taking care [38]

(Testimony of Jacob H. Fulmer.)

of himself, without a lifetime job from anybody?

Mr. FULMER.—No, sir.

Mr. CANNON.—You stated that he lived beyond Thirty-fifth St. on Washington Ave.—had he been in the habit of riding in on the street-cars, or walking in?

Mr. FULMER.—He was in the habit of walking in, so he told me.

Mr. CANNON.—The distance is some three miles, is it not?

Mr. FULMER.—Now, I would not say for sure as to the exact distance—I think the blocks run eight to the mile, and it is much more than a mile.

Mr. CANNON.—He preferred to walk than ride?

Mr. FULMER.—Yes, sir. He said he had been in the habit of walking back and forth.

Mr. CANNON.—Did he say anything to you about being under a doctor's care?

Mr. FULMER.—He said he had been examined by two physicians in Ogden.

Mr. CANNON.—Did he mention the names of those physicians?

Mr. FULMER.—He did.

Mr. CANNON.—Will you kindly give the names?

Mr. FULMER.—One of them is Dr. R. E. Worrell, Eccles Bldg., Ogden; as to the other one, he said Dr. Robinson. There are two doctors of this name, one A. A. Robinson, office in Lewis Bldg., and another is H. Eugene Robinson, office in Hudson Bldg. He also stated he was going to Reno to be examined by specialists there.

Mr. CANNON.—Did he give the name of the specialist?

Mr. FULMER.—No, sir. He said he was advised by Grant Miller to go there.

Mr. CANNON.—Did Houston mention to you, while you were with him, that he was having any trouble sleeping at night?

Mr. FULMER.—No, sir; said he was resting quite well and feeling good.

Mr. CANNON.—Did he give you any impression that his appetite was not first class?

Mr. FULMER.—Not at all. He dined with me on two different occasions. Both times he ate a very hearty meal. During one meal he ate [39] one dozen raw oysters, together with trimmings. At another meal, he ate a porterhouse or T-bone steak, with potatoes, vegetables, etc., which he seemed to relish, in fact, he ate a very hearty meal.

Mr. CANNON.—You stated Mr. Houston walked as well as you ever saw him, now are you sure that he did not limp?

Mr. FULMER.—I did not notice him limping.

Mr. CANNON.—When did you last see him?

Mr. FULMER.—About 5:30 in the evening, on the 20th of October.

J. H. FULMER,
Brakeman."

Deposition of Dr. Frederick Hershman, for Defendant.

The deposition of Dr. FREDERICK HERSHMAN, Chief Surgeon for the Chile Exploration Company of Chuquicamata, Chile, a witness in be-

half of defendant, was read and showed that Dr. Hershman, while acting Chief Surgeon of defendant company, examined plaintiff on August 26th and August 29th, 1914, and could find nothing wrong with him. He reached the conclusion that plaintiff was not incapacitated from performing manual labor or the duties of brakeman and that he was malingering.

Testimony of Dr. C. E. Early, for Defendant.

Dr. C. E. EARLY, defendant's Chief Surgeon, a witness in behalf of defendant, testified that he saw plaintiff on the night of the collision, March 19, 1914, and during the following week while plaintiff was in the hospital, and diagnosed his injuries as a contused (bruised) left knee; that neither plaintiff's back nor his right knee was swollen or bruised; that he examined plaintiff thoroughly about a week or so after plaintiff left the hospital and could make no other diagnosis but malingering; that in his opinion plaintiff was not at the time of the trial suffering from traumatic neurasthenia.

Testimony of Dr. W. S. Holmquist, for Defendant.

Dr. W. S. HOLMQUIST, a physician and surgeon of Ely, Nevada, a witness in behalf of defendant, testified that he examined the plaintiff about a month after the collision, gave him a prescription for headache and advised him to consult a nerve specialist in San Francisco, also probably recommended a lower altitude; that from his observation [40] of plaintiff during the trial, in the courtroom

(Testimony of W. S. Holmquist.)

and on the street, it was his opinion that plaintiff was not suffering from traumatic neurasthenia.

Testimony of Dr. Donald Maclean, for Defendant.

Dr. DONALD MACLEAN, a practicing physician and surgeon of Carson City, Nevada, was called as a witness in behalf of defendant and testified in part as follows:

I have had an opportunity to observe the plaintiff, Clyde W. Houston. I have observed him here in the courtroom and on the streets and I had an opportunity to examine him last night. The examination was made in Doctor Mackenzie's office in Reno, Nevada.

I endeavored to impress Mr. Houston with the idea that I desired to examine him in the same manner I would any patient who consulted me in my office, making complaint of any serious disease, or any obscure disease; that I had no prejudice against him, desired to examine him in a purely impartial manner, for that purpose I took his history, the same as I would with any other patient, his age, the year he was born, what his occupation was, and that sort of thing, and what he complained of; and endeavored to get him to tell me exactly what his complaint was,—what his symptoms were. After having listened to such information as I got in that way, I then stripped him, and examined him as fully as one can in that manner; I examined all his reflexes, his eye reflexes, his abdominal reflexes, his knee reflexes, knee jerk, ankle clonus, and planter reflexes; I examined his heart and chest, examined his ab-

(Testimony of Dr. Donald Maclean.)

dominal organs by percussion and by palpation, that is, by sounding them and by feeling them; and I then examined his spine for tender areas. That examination convinced me that he has had no definite lesion of any kind whatsoever. All his reflexes were absolutely normal; there was neither exageration nor diminution of any of them. The examination of his spine elicited several complaints from him as to extreme tenderness in several different areas; repeated examinations failed to elicit complaint from him of tenderness in the same area at any two times. I attempted to test his muscular [41] strength by having him push with his foot against my hand; he complained of severe pain, and inability to make pressure; this complaint in my opinion, could not be true, for the reason that the pressure made against my hand by his foot was not one-quarter of the pressure that he would have to make in taking an ordinary step upon the ground. He complained of pain upon my making an effort to bend his leg upon his body. He was lying upon the table when I endeavored to bend his leg in this manner; he objected, and said it caused great pain, and refused to allow me to bend it beyond that, which is hardly the height a man would raise his leg in taking an ordinary step, certainly not the height that he would raise it in going up the stairs, leading one to believe—leading me to believe, that the pain of which he complained was feigned. I could find no abnormality of any kind, with the exception of a slightly furred tongue, which

(Testimony of Dr. Donald Maclean.)

would be natural in any man upon a milk diet or a liquid diet; and the fact that his pulse rate was faster than one would expect in a man of his type and occupation. I believe that the rate of his pulse, ninety-six to one hundred, was no faster than any man's would be who was being examined in the presence of five doctors and two lawyers and in a strange office. It is a hard matter to differentiate, in my opinion, between neurasthenia and malingering; I believe them to be nearly the same thing; they might be differentiated in this way, by saying that a malingerer is a man who is endeavoring to deceive the public, or some given person, knowing that he is deceiving them, whereas a neurasthenic is a person who is deceiving the public and himself at the same time; but in this instance I am inclined to believe that he is purely a malingerer, and not a true neurasthenic, if such a thing exists.

I don't believe a sudden physical shock, such as a man jumping from a railroad train, would cause a low position of any of the organs of the abdomen with the possible exception of the solid organs, meaning thereby the kidneys, the spleen and very possibly the liver; the heavy solid organs might be displaced in such an accident but the hollow organs, the stomach and intestines, I don't believe could be [42] displaced by such an accident. As to whether such a low position of the stomach and caecum might result from neurasthenia, I don't see how in the world such a thing could occur; I don't see how neurasthenia could cause any such condition. It is gener-

(Testimony of Dr. Donald Maclean.)

ally granted to-day that ptosis of the stomach is congenital in as good as one-third of all the cases; in the other instances, there has never been any really scientific explanation made of it. Ptosis of the stomach does not necessarily indicate a diseased condition or abnormal functioning of the stomach. It is probable that the large percentage of cases of ptosis of the stomach give rise to no symptoms whatsoever. It is more than likely that no two stomachs are in the same position in any two individuals; the probabilities are that there is a variation in all cases.

On Cross-examination.

I would not want to say that I was absolutely thoroughly satisfied that Mr. Houston is purely malingering and is a well man. I am satisfied in my own mind that he is malingering; but I will say that there might be an element of neurasthenia; in fact, I suppose in all cases of malingering there is bound to be an element of neurasthenia.

I don't believe that ptosis of the stomach of four inches and the caecum five inches will in ninety per cent or ninety-five per cent of cases cause any symptoms whatsoever.

On redirect examination, the following proceedings occurred:

"Q. What is the effect on so-called traumatic neurasthenia, involving cases where a claim for a financial reimbursement is made, of a money settlement?

A. A cure in nearly every instance. I will say that statistics show in foreign countries where these

(Testimony of Dr. Donald Maclean.)

cases are settled, where they have industrial laws for the protection of workingmen,—in Denmark, Sweden and Switzerland, where the cases are settled for a lump sum, settlements—

Mr. MILLER.—Just a moment, if the Court please; I object to the hearsay statements of counsel, outside of matters of professional [43] education and training.

Mr. CHANDLER.—(Q.) I will ask the Doctor as to whether this information is a part of the knowledge of the professional medical practitioner, and a part of the science or knowledge of the medical profession?

A. I don't know that it is a part of the knowledge of the profession as a whole, but it comes to me as the medical adviser of the Industrial Commission; it comes in my line more particularly; but I imagine that the medical profession as a whole would be familiar with these facts.

Q. Are these statistics you are about to refer to of importance to the medical practitioner in dealing with cases of this kind? A. They are.

Mr. CHANDLER.—I submit, if the Court please, that the question was proper, and ought to be answered.

Mr. MILLER.—I further object, if your Honor please, to the entire question as irrelevant—

The COURT.—I think I would rather hear from the other side. Of course if this case is feigned, if this is purely a case of malingering, there is no question but that the payment of the money will effect a

(Testimony of Dr. Donald Maclean.)

cure, but that is the very matter to be determined. It seems to me you might quite as well in the ordinary criminal case introduce testimony before the jury to show that in ninety per cent of the cases where indictments were brought against defendants, they had been convicted. I don't believe it is proper testimony.

(Discussion.)

The COURT.—If you could prove by this witness that the payment of money will effect a cure, I should certainly allow the testimony; but the fact that the payment of money in a specified number of cases has been followed by a cure, it seems to me is getting proof the wrong way. I think the case must be decided on its own merits.

Mr. CHANDLER.—We desire to note an exception.

The COURT.—You may have the exception." [44]

Instructions to Jury Requested by Defendant.

At the conclusion of the evidence, the defendant requested the Court to instruct the jury, among other things, as follows:

"Such damages only may be allowed which are shown to have been the result of the injury which he received at the time of the accident not exceeding in any respect the amount claimed in the complaint. In respect to plaintiff's nervous or other ailments which manifested themselves subsequent to the accident, you will determine from the evidence whether

they did or did not result from injuries sustained at the time. If they did, and this was the sole cause of them, or if they developed without fault or negligence of the plaintiff, you should allow proper damages therefor. If, however, they were the result wholly or in part of plaintiff's introspection, or failure to return to work in proper time, damages should not be allowed on account thereof."

The Court, however, in instructing the jury at the conclusion of the argument, after reading to the jury the above requested instruction, added: "I will change that sentence: If they did, and this was the sole cause of them—if it was the sole cause or if in part it caused them, plaintiff would be entitled to recover such damages as you in your judgment deem that he was actually entitled to."

To this modification of said requested instruction and to the giving of the instruction as so modified defendant excepted before the cause was submitted to the jury, which exception was allowed by the Court.

The entire instructions which at the conclusion of the argument were given by the Court to the jury were as follows:

Instructions of Court to Jury.

"The COURT.—Gentlemen, many of the rules that guide you in a criminal case are the same as those which should be applied in a civil case; the main difference is in the amount of testimony required to warrant a verdict.

"The burden in this case, the law throws on the plaintiff; he must establish his case, and establish

every material element of it, not beyond a reasonable doubt, but by a preponderance of the evidence; and by a preponderance of the evidence we simply mean that the testimony [45] in his favor must outweight the testimony against him; if he fails to establish his case by a preponderance of the evidence, it is your duty to find for the defendant.

"The defendant in this case is a corporation. It is needless, however, for me to instruct you that you are not to take that into consideration. The defendant, although it is a corporation, is entitled to the same full share of justice you would award to an individual. You cannot award a large verdict, or award a verdict simply because the defendant is a corporation. The case must be proven, and it must be proven by the facts, and by the evidence introduced. You are not to be swayed by sympathy, you are not to be drawn from the straight and narrow way by any other facts than those introduced in evidence. In other words, you are to do that which is fair and just and right as between one man and another.

"Each party argues that the other has a financial interest in this case, and it is true; but it is the same financial interest which occurs in every civil case; the plaintiff wants all he can get, and the defendant wants to pay as little as possible. This is always the rule; it is nothing unusual in this case.

"According to the complaint and the admissions, it appears that an accident occurred—a collision—on the Nevada Northern Railwav about the 19th day of March of last year. In order to escape more seri-

ous injury, this plaintiff leaped from the train, and received certain injuries alleged in the complaint; and you are instructed that the plaintiff can only recover on the case that he made in the complaint; he can recover no more than he has asked.

"By reason of this collision, the complaint says: 'The plaintiff then and there sustained and suffered divers serious injuries of his back and spinal cord, his neck and his right leg, and was cut, scratched, bruised and injured in divers other parts of his body; that by reason of said injuries, the plaintiff has been unable to work at his regular business as brakeman for the period of 200 days and has been permanently injured and disabled so that the [46] plaintiff believes and therefore avers that he will be unable to engage in his said occupation as railway brakeman during the remainder of his life, and that he has been so injured and permanently disabled that during the remainder of his life he will be unable to do or perform any manual or other work sufficient to earn his living; that said plaintiff has not sufficient education to engage in any occupation except manual labor. That in consequence of said injuries the plaintiff suffered excruciating pain and agony of body and mind, and his nerves were greatly injured and his nervous system wholly disordered; that the defendant has been obliged to expend large sums of money and to incur large liabilities in endeavors to have himself cured of said injuries and maladies and the effects thereof. That by reason of said injuries the plaintiff has sustained loss and damage in the sum

of Fifty Thousand Dollars.'

"In the answer the defenant admits the collision, and admits that plaintiff leaped from the train in order to avoid more serious injury. It also admits that as a result of the collision plaintiff suffered slight bruises and scratches from which he speedily recovered, and which did not incapacitate him from performing his usual and ordinary work for a period of more than thirty days.

"In the present state of the issues and of the pleadings, the defendant has admitted its liability; it has admitted that as a result of this accident plaintiff did suffer slight injuries, and was incapacitated for thirty days from work. Of course, under the admission, the plaintiff is entintled to recover for that.

"The question remains as to whether he has suffered any further injury, and that is for you to determine from the evidence. You have heard the testimony, not only of the ordinary witnesses, but of the experts; and you have heard the arguments of counsel. Counsel have expressed their ideas very definitely, and the experts have also expressed themselves quite decidely on this point, and they fail to agree.

"The testimony of experts is admitted here in order to enlighten [47] you on subjects the ordinary man is not supposed to be acquainted with. The expert has technical knowledge that no one can acquire except after a long course of study, and these doctors have come here to give us the benefit of their learning; they have given their opinions,

but their opinions are to have no further weight with you than seem to be justified by the facts, by the conditions and by the evidence which you have heard. As I have told you repeatedly, it is your opinion and your judgment as to what is proven which is demanded by the law, and you are to give your own judgment, irrespective of what other opinions may have been advanced either by counsel, by witnesses, or by the Court; and that judgment is to be based on what you find in the testimony. An opinion is only to guide you in so far as it is supported by the evidence, and by the conditions which have been presented here for your examination.

"Every witness who comes upon the stand is presumed to tell the truth, and that presumption is to be indulged with reference to every witness who appears here, until by his conduct or by his demeanor upon the witness-stand, or by contradictory evidence, he is shown to have forfeited it. You are entitled to consider the interest which each witness has in this case, not only the interest of the plaintiff, but the interest of other witnesses, if they appear to have any. You are to consider their motives, their demeanor upon the witness-stand, and the manner in which they give their testimony, whether they give it frankly, freely and openly, with an evident desire to tell the truth, or whether they are reserving something that they ought to disclose.

"It is unnecessary for me to tell you that you are not to presume from the fact that a man is employed by this corporation that he is not telling the truth; nor can you indulge a similar presumption

with reference to the plaintiff because he is the plaintiff. You are simply to weigh the testimony, and determine the credibility of the witnesses, just as you would determine the truth of a story in ordinary life. [48]

"If a witness on the stand has deliberately stated that which is untrue as to a material fact, you are at liberty to disregard the whole of his testimony, except as it is corroborated by other credible evidence in the case.

"A number of instructions have been presented to me, but they were presented so late that I have not been able to go over them as carefully as I should, but I will read a number of them, and comment on others.

"You are not to consider any testimony that has been stricken out by the order of the Court.

"A party to an action may testify in his own behalf, but the law permits the interest of the witness, or the interest of a party, to be considered as affecting his credibility as a witness; and it is your duty to consider the weight to be given to the plaintiff's testimony, consider the interest which he has in the result of this action. In weighing his testimony you should also consider whether or not his statements are probable in view of all the circumstances of the case; whether or not his statements are consistent with each other; and whether or not they conflict with statements or declarations which he may have made at any previous time. If you should believe that the plaintiff, or any other witness, has falsely testified to any material fact in the case,

you will be authorized to reject all of his testimony except such testimony as is corroborated by other credible evidence. He must have wilfully testified falsely in order that that rule may become operative. If you find that a witness has merely made a mistake, it does not justify you in rejecting his testimony; it would, however, warrant a more careful examination of his evidence.

"It is not necessary that any witness should have expressed an opinion as to the amount of the damages. You can determine that yourself from the evidence which has been given, provided you can find the plaintiff is entitled to any damage in excess of that which is practically admitted. [49]

"The burden of proof is on the plaintiff to show the extent of the alleged injuries caused by the collision. If the jury believe from all the evidence in the case that plaintiff was suffering from some disease at the time of the accident, then plaintiff will not be entitled to recover damages for such disease, but would be confined to damages resulting from injuries received because of the collision; and if the jury believe from all the evidence that plaintiff is now suffering from any disease, yet, unless the jury believe from all the evidence that such disease was caused by the collision, or was increased by the collision, the plaintiff will not be entitled to recover damages for such disease, but the plaintiff is entitled to recover damages for whatever injuries, or the result thereof, you believe from all the evidence in the case he has sustained by reason of the collision.

"You will give plaintiff as damages so much

money as will fully compensate him for all loss of time he has or may hereafter suffer, and for all pain, both physical and mental, which he has or may hereafter endure as the direct, natural and probable result of defendant's fault. If you find he has any nervous trouble induced by dwelling upon his claim against the defendant railroad company, and on the probable result of his suit, you will not consider it in assessing his damages. In assessing his damages you will consider the physical injury he actually received, and mental pain and suffering which resulted directly from the injury, if any. You will not consider any fictitious pain and suffering, if you find that there is any fictitious pain and suffering, due to the disordered imagination, for he can only recover for actual and not imaginary pain.

"Plaintiff claims to have lost earnings by reason of his injury. Beyond the first thirty days it matters not what loss there has been, if any, in the earnings of the plaintiff, unless that loss was directly caused by the necessary result of the injury received on March 19th, 1914. If the plaintiff could have earned money by reasonable effort, and neglected to do so, he cannot charge such loss, if any, to the defendant. [50]

"Such damages only may be allowed as are shown to have been the result of the injury which he received at the time of the accident, not exceeding in any respect the amount claimed in the complaint. In respect to plaintiff's nervous or other ailments which manifested themselves subsequent to the accident, you will determine from the evidence whether they

did or not result from injuries sustained at the time. If they did, and that was the sole cause of them, you would allow proper damages therefor; if, however, they were the result of plaintiff's introspection or failure to return to work in the proper time, damages should not be allowed on account thereof. I will change that sentence: If they did, and this was the sole cause of them—if it was the sole cause, or if in part it caused them, plaintiff would be entitled to recover such damages as you in your judgment, deem that he was actually entitled to.

"If you believe from the evidence that plaintiff suffered only slight physical injuries as a result of the collision, although he received and suffered fright, and subsequently suffered from nervous trouble; and if you further believe from the evidence that the nervous trouble was not the result of the accident and injury which plaintiff received as a result of the collision, then you are instructed that the plaintiff cannot recover except for damages involved in the accident, and the mental and physical suffering actually resulting therefrom, if any, together with such expenses as were actually incurred by him for professional treatment and for the thirty days time, which has already been mentioned.

"I will read another instruction, which is probably to the same effect. If you find from the evidence that the plaintiff is entitled to recover, as alleged in his complaint, then in estimating his damages you may take into consideration his health and physical condition prior to the injury, also his health and physical condition since then, in so far as you find

from the evidence that his health and physical condition since then is impaired as the result of such injury; and you may also consider whether or not he has been permanently [51] injured, and to what extent, and also to what extent, if any, he may have endured physical suffering as the natural and inevitable result of such injury, and the value of any time you may believe from the evidence he has lost on account of such injury; and you may consider what, if any, effect such injuries may have upon him in the future, or in respect to his power to earn money by his labor; and you should allow him as damages such sum as, in the exercise of sound discretion, you may believe from all the facts and circumstances involved, will be a fair and just compensation to him for his injury, but not exceeding the whole sum of fifty thousand dollars.

"Damages in all cases of personal injury are divided into two classes; one of them is known as punitive, and the other as pecuniary. Punitive damages are damages which are awarded in the way of smart money; pecuniary damages are supposed to be a precise and exact compensation for the injury that is suffered. In this case you cannot award any punitive damages; you can only award a sum, if you find that the plaintiff is entitled to anything, which will be an exact equivalent of the injury he has suffered; and that is to be qualified by the instructions which have already been given to you."

The foregoing does not include all the evidence and proceedings in the cause, but does include all the

evidence and proceedings in any way affecting, bearing on or necessary to explain the exceptions taken by and allowed to defendant.

The foregoing Bill of Exceptions is hereby allowed and settled this 17th day of May, 1916.

E. S. FARRINGTON,
Judge of Said Court.

Service by copy of the within bill of exceptions on this 29th day of April, 1916, is hereby acknowledged.

DIXON & MILLER.
By A. GRANT MILLER,
Attorneys for Plaintiff. [52]

[Endorsed]: No. 1874. In the United States District Court for the District of Nevada, Ninth Circuit. Clyde W. Houston, Plaintiff, vs. Nevada Northern Ry. Co., a Corporation, Defendant. Bill of Exceptions. Filed May 1st, 1916. T. J. Edwards, Clerk. Chandler & Quayle, Attorneys for Defendant, Ely, Nevada. [53]

No. 1874.

CLYDE W. HOUSTON
vs.
NEVADA NORTHERN RY. CO.

Order Denying Motion for New Trial, of Date April 8th, 1916.

The motion for a new trial, heretofore argued and submitted, having been duly considered by the Court, it is now ordered that the same be, and is hereby, de-

nied; and that the parties have twenty days' time within which to take such further steps as advised. [54]

In the United States District Court for the District of Nevada, Ninth Circuit.

CLYDE W. HOUSTON,
Plaintiff (Defendant in Error),
vs.
NEVADA NORTHERN RAILWAY COMPANY,
a Corporation,
Defendant (Plaintiff in Error).

Petition for Writ of Error.

To the Honorable, the Said Court:

Said Nevada Northern Railway Company, your petitioner, respectfully shows: That in the record and proceedings, as also in the rendition of the judgment, of a plea which is in said court between Clyde W. Houston, plaintiff, and the Nevada Northern Railway Company, a Corporation, defendant, manifest errors have happened, to the great damage of the said Nevada Northern Railway Company, as will more particularly appear from the assignment of errors of said Nevada Northern Railway Company which is filed herewith and which is hereby referred to for all the particulars thereby shown;

WHEREFORE, your petitioner prays that a writ of error from the United States Circuit Court of Appeals of the Ninth Circuit be allowed in said cause, to the end that such errors shall be fully corrected

and full and speedy justice be done to the parties aforesaid in this behalf.

CHANDLER & QUAYLE,
Attorneys for Said Nevada Northern Railway Company.
CURTIS H. LINDLEY,
Of Counsel.

The foregoing petition is allowed this 6th day of June, 1916.

E. S. FARRINGTON,
Judge of Said Court.

[Endorsed]: No. 1874. In the United States District Court for the District of Nevada, Ninth Circuit. Clyde W. Houston, Plaintiff (Defendant in Error), vs. Nevada Northern Railway Co., a Corporation, Defendant (Plaintiff in Error). Petition for Writ of Error. Filed June 5th, 1916. T. J. Edwards, Clerk. Chandler & Quayle, Attorneys for Defendant, Ely, Nevada. [55]

In the Circuit Court of Appeals of the United States for the Ninth Circuit.

NEVADA NORTHERN RAILWAY COMPANY,
a Corporation,
Plaintiff in Error,

vs.

CLYDE W. HOUSTON,
Defendant in Error.

Assignment of Errors.

Comes now the said Nevada Northern Railway

Company, plaintiff in error, and says that in the record and proceedings in the above-entitled matter there is manifest error in this:

1. The District Court erred in excluding from evidence on the redirect examination of witness Jacob H. Fulmer the copy of the written statement made by said witness to the General Manager of the plaintiff in error, a portion of which statement was read to the witness Fulmer on cross-examination and on which he was cross-examined.

The said statement so excluded from evidence was in the words and figures following:

"East Ely, Nevada, November 5th, 1914.

STATEMENT MADE BY MR. J. H. FULMER.

Mr. CANNON.—Mr. Fulmer, you were in Ogden recently; what date was it?

Mr. FULMER.—I was in Ogden on the 17th day of October, 1914.

Mr. CANNON.—You were there several days, weren't you?

Mr. FULMER.—Yes, sir.

Mr. CANNON.—While you were there, did you see C. W. Houston, who formerly was a brakeman for this company?

Mr. FULMER.—Yes, sir.

Mr. CANNON.—On what date did you first see him? [56]

Mr. FULMER.—I saw him on the 17th of October.

Mr. CANNON.—Did he see you on the same date?

Mr. FULMER.—Yes, sir.

Mr. CANNON.—I wish you would state just what transpired.

Mr. FULMER.—I arrived in Ogden about 5:40 in the evening, on October 17th. About seven o'clock in the evening, I was standing on the corner of Twenty-fifth St. and Washington Ave. Mr. Houston, in company with two other gentlemen, passed me. After they had passed, I thought I recognized Houston, and I followed them a short distance behind, for about three blocks on Twenty-fifth St. towards the depot.

Mr. CANNON.—Did you catch up with him, and have a conversation with him?

Mr. FULMER.—They stopped and I caught up with them.

Mr. CANNON.—Will you please state what your conversation was?

Mr. FULMER.—I asked Mr. Houston how he felt; he said he felt very good. I asked him where he lived; he said out on Thirty-fifth St. I asked him if he had been working any; he said he had not, that he was unable to secure any work, but he had the promise of a job with a canning factory.

Mr. CANNON.—Did he tell you what kind of work he was going to do for the canning factory?

Mr. FULMER.—No, sir; he did not. He just said that he had a promise of a job with a canning factory.

Mr. CANNON.—Did he indicate by his method or manner of walking, or otherwise, that he was not in first-class physical condition?

Mr. FULMER.—He apparently was as well as I ever saw him. He walked just as well as I ever saw him walk.

Mr. CANNON.—Did he have anything to say to you in regard to the suit which he has instituted against this company?

Mr. FULMER.—Not on that day.

Mr. CANNON.—Then you saw him subsequently?

Mr. FULMER.—I did.

Mr. CANNON.—Did he then have anything to say? [57]

Mr. FULMER.—I saw him on the following day, the 18th. Was with him all the forenoon and up until 2:45 o'clock in the afternoon. He seemed to be in good spirits and good health.

Mr. CANNON.—Did he mention anything about the suit?

Mr. FULMER.—Not on that day.

Mr. CANNON.—That is, not on the 18th.

Mr. FULMER.—No, sir.

Mr. CANNON.—Did he have anything to say about the suit on the following day, or on any subsequent day?

Mr. FULMER.—He did, yes; on the 20th.

Mr. CANNON.—Will you please state what he said?

Mr. FULMER.—He and I were walking around that day and finally sat down on the curb, facing Twenty-fifth St. and Washington Ave. He told me that if the Nevada Northern Railway Company had given him $1,000.00 and a lifetime job, he would have settled with them.

Mr. CANNON.—Your conversation with him, and your association with him would not convince you that he was incapacitated for taking care of himself,

without a lifetime job from anybody?

Mr. FULMER.—No, sir.

Mr. CANNON.—You stated that he lived beyond Thirty-fifth St. on Washington Ave.—had he been in the habit of riding in on the street-cars, or walking in?

Mr. FULMER.—He was in the habit of walking in, so he told me.

Mr. CANNON.—The distance is some three miles, is it not?

Mr. FULMER.—Now I would not say for sure as to the exact distance—I think the blocks run eight to the mile, and it is much more than a mile.

Mr. CANNON.—He preferred to walk than ride?

Mr. FULMER.—Yes, sir. He said he had been in the habit of walking back and forth.

Mr. CANNON.—Did he say anything to you about being under a doctor's care? [58]

Mr. FULMER.—He said he had been examined by two physicians in Ogden.

Mr. CANNON.—Did he mention the names of those physicians?

Mr. FULMER.—He did.

Mr. CANNON.—Will you kindly give the names?

Mr. FULMER.—One of them is Dr. R. E. Worrell, Eccles Bldg., Ogden; as to the other one, he said Dr. Robinson. There are two doctors of this name, one A. A. Robinson, office in Lewis Bldg., and another is H. Eugene Robinson, office in Hudson Bldg. He also stated he was going to Reno to be examined by specialists there.

Mr. CANNON.—Did he give the name of the specialist?

Mr. FULMER.—No, sir. He said he was advised by Grant Miller to go there.

Mr. CANNON.—Did Houston mention to you, while you were with him, that he was having any trouble sleeping at night?

Mr. FULMER.—No, sir; said he was resting quite well and feeling good.

Mr. CANNON.—Did he give you any impression that his appetite was not first-class?

Mr. FULMER.—Not at all. He dined with me on two different occasions. Both times he ate a very hearty meal. During one meal he ate one dozen raw oysters, together with trimmings. At another meal, he ate a porterhouse or T-bone steak, with potatoes, vegetables, etc., which he seemed to relish, in fact, he ate a very hearty meal.

Mr. CANNON.—You stated Mr. Houston walked as well as you ever saw him, now are you sure that he did not limp?

Mr. FULMER.—I did not notice him limping.

Mr. CANNON.—When did you last see him?

Mr. FULMER.—About 5:30 in the evening, on the 20th of October.

J. H. FULMER,
Brakeman." [59]

2. The Court erred in sustaining the objection to the answer of the witness Maclean to the following question: "What is the effect of so-called traumatic neurasthenia, involving cases where claim for a financial reimbursement is made, of a money settlement?"

and in prohibiting the witness in his answer from stating the results shown in foreign countries and in Denmark, Sweden and Switzerland (where there are industrial laws for the protection of working men) as to the effects on traumatic neurasthenia patients of lump sum settlements.

The testimony and proceedings on this point in the examination of the witness Maclean as shown by the transcript of the testimony were as follows:

"Q. What is the effect on so-called traumatic neurasthenia, involving cases where a claim for a financial reimbursement is made, of a money settlement?

A. A cure in nearly every instance. I will say that statistics show in foreign countries where these cases are settled, where they have industrial laws for the protection of working men,—in Denmark, Sweden and Switzerland, where the cases are settled for a lump sum, settlements—

Mr. MILLER.—Just a moment, if the Court please; I object to the hearsay statements of counsel, outside of matters of professional education and training.

Mr. CHANDLER.—(Q.) I will ask the doctor as to whether this information is a part of the knowledge of the professional medical practitioner, and a part of the science or knowledge of the medical profession?

A. I don't know that it is a part of the knowledge of the profession as a whole, but it comes to me as the medical adviser of the Industrial Commission; it comes in my line more particularly; but I imagine

that the medical profession as a whole would be familiar with these facts.

Q. Are these statistics you are about to refer to of importance to the medical practitioner in dealing with cases of this kind? [60]

A. They are.

Mr. CHANDLER.—I submit, if the Court please, that the question was proper, and ought to be answered.

Mr. MILLER.—I further object, if your Honor please, to the entire question as irrelevant—

The COURT.—I think I would rather hear from the other side. Of course if this case is feigned, if this is purely a case of malingering, there is no question but that the payment of the money will effect a cure, but that is the very matter to be determined. It seems to me you might quite as well in the ordinary criminal case introduce testimony before the jury to show that in ninety per cent of the cases where indictments were brought against defendants, they had been convicted. I don't believe it is proper testimony.

(Discussion.)

The COURT.—If you could prove by this witness that the payment of money will effect a cure, I should certainly allow the testimony; but the fact that the payment of money in a specified number of cases has been followed by a cure, it seems to me is getting proof the wrong way. I think the case must be decided on its own merits.

Mr. CHANDLER.—We desire to note an exception.

The COURT.—You may have the exception."

3. The Court erred in modifying and giving to the jury as modified the eighth instruction requested by plaintiff in error. This instruction as requested by plaintiff in error read as follows:

"Such damages only may be allowed which are shown to have been the result of the injury which he received at the time of the accident not exceeding in any respect the amount claimed in the complaint. In respect to plaintiff's nervous or other ailments which manifested themselves subsequent to the accident, you will determine from the evidence whether they did or did not result from injuries sustained at the time. If they did, and this was the [61] sole cause of them, or if they developed without fault or negligence of the plaintiff, you should allow proper damages therefor. If, however, they were the result wholly or in part of plaintiff's introspection, or failure to return to work in proper time, damages should not be allowed on account thereof."

The Court read the instruction as above set forth, to the jury, and then added: "I will change that sentence: If they did, and this was the sole cause of them —if it was the sole cause, or if in part it caused them, plaintiff would be entitled to recover such damages as you in your judgment, deem that he was actually entitled to."

WHEREFORE, the said Nevada Northern Railway Company, plaintiff in error, prays that the judgment of the said United States District Court for the District of Nevada in the above-entitled cause be re-

versed, and that the said Court be directed to grant plaintiff in error a new trial in said cause.

CHANDLER & QUAYLE,
Attorneys for Plaintiff in Error.

CURTIS H. LINDLEY,
Of Counsel.

[Endorsed]: In the Circuit Court of Appeals of the United States, for the Ninth Circuit. Nevada Northern Railway Co., a Corporation, Plaintiff in Error, vs. Clyde W. Houston, Defendant in Error. Assignment of Errors. Filed June 5th, 1916. T. J. Edwards, Clerk U. S. Dist. Court, Dist. Nevada. Chandler & Quayle, Attorneys for Plaintiff in Error. Ely, Nevada. [62]

In the District Court of the United States for the District of Nevada, Ninth Circuit.

NEVADA NORTHERN RAILWAY COMPANY,
a Corporation,
Plaintiff in Error,
vs.
CLYDE W. HOUSTON,
Defendant in Error.

Supersedeas and Cost Bond.

KNOW ALL MEN BY THESE PRESENTS, That, WHEREAS, the said plaintiff in error, the Nevada Northern Railway Company, a corporation, has sued out a Writ of Error in the above-entitled cause from the Circuit Court of Appeals of the Ninth Circuit, and desires to secure a supersedeas and stay

of proceedings and process on the judgment in said cause;

NOW, THEREFORE, the undersigned Nevada Northern Railway Company, said plaintiff in error, as principal, and W. N. McGill of Ely, Nevada, by occupation a rancher and stockman, and D. P. Bartley, of Ely, Nevada, by occupation a druggist, as sureties, in consideration of the premises and of the said supersedeas and stay of process and proceedings, do hereby, jointly and severally, undertake in the sum of Sixteen Thousand Dollars, lawful money of the United States, and in the said sum do promise that said Nevada Northern Railway Company shall prosecute its said writ of error to effect and shall answer all damages and costs if it fails to make its plea good.

IN WITNESS WHEREOF, the said principal has caused these presents to be executed by its Vice-President and General Manager, and the said sureties have hereunto subscribed their names this [63] twenty-ninth day of May, 1916.

NEVADA NORTHERN RAILWAY COMPANY.

By L. G. CANNON,
Its Vice-President and General Manager.

W. N. McGILL.

D. P. BARTLEY.

State of Nevada,
County of White Pine,—ss.

W. N. McGill and D. P. Bartley, the sureties named in and who signed the above undertaking, being first duly sworn, each for himself and not one for the other, deposes and says: That he is a resident

and householder within the County of White Pine, State of Nevada, and is worth the amount specified in said undertaking, over and above his just debts and liabilities, exclusive of property exempt from execution.

W. N. McGILL.
D. P. BARTLEY.

Subscribed and sworn to before me this 31st day of May, 1916.

[Seal] C. O. FLEMING,
Notary Public in and for said County and State.

The foregoing undertaking and the sureties therein named are hereby approved this 6th day of June, 1916.

E. S. FARRINGTON,
Judge of the District Court of the United States for the District of Nevada, Ninth Circuit.

[Endorsed]: No. 1874. In the District Court of the United States for the District of Nevada, Ninth Circuit. Nevada Northern Railway Company, Plaintiff in Error, vs. Clyde W. Houston, Defendant in Error. Supersedeas and Cost Bond. Filed June 7th, 1916. T. J. Edwards, Clerk. Chandler & Quayle, Attorneys for Plaintiff in Error, Ely, Nevada. [64]

In the District Court of the United States for the District of Nevada.

No. 1874.

CLYDE W. HOUSTON,

Plaintiff,

vs.

NEVADA NORTHERN RAILWAY COMPANY, a Corporation,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, T. J. Edwards, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that the foregoing sixty-four (64) typewritten pages, numbered from 1 to 64, inclusive, to be a full, true and correct copy of the record and of all proceedings in said cause and court, and that the same, together with the original Citation and Writ of Error, hereto annexed, constitute the return to the Writ of Error.

I further certify that no opinion has been filed by the Court, denying the Motion for a New Trial.

I further certify that the cost of the foregoing record is $75.80 and that the same has been paid by the defendant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Carson City, Nevada, this 3d day of July, 1916.

[Seal] T. J. EDWARDS,
Clerk.

[Ten Cent Internal Revenue Stamp. Canceled 7/3/16. T. J. E.] [65]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

To Clyde W. Houston, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City and County of San Francisco on the 5th day of July, 1916, pursuant to writ of error filed in the Clerk's office of the District Court of the United States for the District of Nevada, Ninth Circuit, wherein the Nevada Northern Railway Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

E. S. FARRINGTON,

Judge of the United States District Court for the District of Nevada.

Dated June 6th, 1916.

Due service and receipt of copy of the within citation on this 12th day of June, 1916, is hereby acknowledged.

DIXON & MILLER,

By A. GRANT MILLER,

Attorneys for Clyde W. Houston, Defendant in Error. [66]

[Endorsed]: No. 1874. In the United States Circuit Court of Appeals for the 9th Circuit. Nevada Northern Railway Co., a Corporation, Plaintiff in

Error, vs. Clyde W. Houston, Defendant in Error. Citation to Circuit Court of Appeals on Writ of Error. Filed June 13th, 1916. T. J. Edwards, Clerk U. S. Dist. Court, Dist. Nevada. [67]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America to the Judge of the District Court of the United States for the District of Nevada, Greeting:

Because in the record and proceedings and as also in the rendition of the judgment of a plea which is in the said District Court before you between Clyde W. Houston, Plaintiff, and Nevada Northern Railway Company, a corporation, defendant, a manifest error hath happened, to the great damage of said Nevada Northern Railway Company, as is said and appears by the complaint: We, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said court in the Federal Building in the City and County of San Francisco, State of California, together with this writ, so that you have the same at said place before the Justices aforesaid on the 5th day of July next, that the records and proceedings aforesaid being in-

spected, the said Justices of the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 7th day of June, in the year of our Lord one thousand nine hundred sixteen, and of the Independence of the United States the [68] one hundred fortieth.

[Seal] T. J. EDWARDS,
Clerk of the District Court of the United States for the District of Nevada, Ninth Circuit.

The foregoing writ is hereby allowed.

E. S. FARRINGTON,
Judge of the District Court of the United States for the District of Nevada, Ninth Circuit.

The plaintiff in error has served the foregoing writ of error on this 7th day of June, 1916, by lodging a copy thereof for the defendant in error in my office, where the record in said cause remains.

T. J. EDWARDS,
Clerk of the District Court of the United States for the District of Nevada, Ninth Circuit. [69]

[Endorsed]: In the United States Circuit Court of Appeals for the 9th Circuit. Nevada Northern Railway Co., a Corporation, Plaintiff in Error, vs. Clyde W. Houston, Defendant in Error. Writ of Error. Filed June 7th, 1916, T. J. Edwards, Clerk U. S .Dist. Court, Dist. Nevada.

[Endorsed]: No. 2826. United States Circuit Court of Appeals for the Ninth Circuit. Nevada Northern Railway Company, a Corporation, Plaintiff in Error, vs. Clyde W. Houston, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Nevada.

Filed July 5, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.